

The Privatisation of Private (and) International Law

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Abstract Privatisation is much studied and debated as a general phenomenon, including in relation to its legal effects and the challenges it presents to the boundaries of public and private law. Outside the criminal context there has however been relatively limited focus on privatisation of the governmental functions which are perhaps of most interest to lawyers—law making, law enforcement and dispute resolution—or on the international legal implications of privatisation. This article argues that modern legal developments in the context of private law and cross-border private legal relations—generally known as party autonomy in private international law—can be usefully analysed as two distinct forms of privatisation. First, privatisation of certain allocative functions of public and private international law, in respect of both institutional and substantive aspects of private law regulation, through the legal effect given to choice of court and choice of law agreements. Second, privatisation of the institutional and substantive regulation of private legal relationships themselves, through arbitration and the recognition of non-state law. Together, these developments have established a global marketplace of state and non-state dispute resolution institutions and private laws, which detaches private law authority from its traditional jurisdictional anchors. Analysing these developments through the lens of privatisation highlights a number of important critical questions which deserve greater consideration—this article further examines in particular whether this form of privatisation in fact increases efficiency in either private international law decision-making or private law dispute resolution, as well as its distributive and regulatory effects.

Keywords: privatisation, marketisation, private international law, conflict of laws, party autonomy, international law, private law, arbitration, non-state law

1. *Introduction*

In modern international contracting practice, parties very frequently specify which court has authority to resolve their disputes, or whether that authority is instead given to an arbitral tribunal, and what set of rules should be applied by that court or tribunal. Historically these

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questions of jurisdiction and applicable law, two of the main issues addressed by the discipline known as private international law, would have been answered by reference to objective connecting factors such as the location of relevant events, or the nationality, residence or domicile of the parties. In modern law, however, these contractual provisions are instead generally given effect by courts and tribunals around the world, and the forum and applicable law are thus determined by private choice and not by objective connection—a phenomenon generally known as party autonomy in private international law.¹ This article makes the argument that this development can be usefully analysed as a form of legal privatisation, and that understanding it in this way provides a helpful framework for thinking through the challenges which it poses.

The article begins by examining, in section 2, the impact of privatisation on the law, and in particular on international law, where shifting domestic boundaries between the public and private have also given rise to challenging international questions concerning state immunity and state responsibility. The article goes on to argue, in sections 3 and 4, that the development of party autonomy in private international law can also be analysed as two distinct forms of privatisation, which similarly challenge legal boundaries. First, privatisation of the allocative functions of public and private international law, in respect of both institutional and substantive aspects of regulation, through the legal effect given to choice of court and choice of law agreements. This development challenges the boundaries between the fields of public and private international law, and between the fields of private law and private international law. Second, privatisation of the institutional and substantive regulation of private legal relationships themselves, through arbitration and the recognition of non-state law. Here, the challenge raised is a distinct question of the relationship between the public and the private—the relationship between private law, including privately generated institutional arrangements, and the state. Together, these developments have established a global marketplace of state and non-state dispute resolution institutions

¹ See generally A Mills, *Party Autonomy in Private International Law* (Cambridge University Press 2018), examining five ‘consistency’ questions concerning party autonomy—whether there is consistency between party autonomy in choice of law and choice of forum, between party autonomy in contract and other areas of private law, between choice of state forums and law and non-state forums and law, between party autonomy in theory and practice, and in the treatment of party autonomy in a number of different legal systems. This article goes beyond these more ‘formal’ questions regarding the coherence of party autonomy, by developing a framework—that of privatisation—through which the substantive effects of party autonomy may helpfully be evaluated.

and private laws, which detaches private law authority from its traditional jurisdictional anchors. Analysing these developments through the lens of privatisation assists in highlighting a number of important critical questions, three of which are examined in section 5—questions of efficiency, distributive effects and regulatory effects. While the forms of legal privatisation examined in this article have potential benefits, they also raise significant challenges which deserve deeper consideration.

2. *Privatisation's Legal Dimensions*

Since the 1980s, under the influence of ideologies which support an increasing role for free markets and a decreasing role for governments, the scope and scale of functions carried out by the state through public authorities has shrunk in many western states. A significant part of this phenomenon is the practice of privatisation. Traditional government functions, like running a postal service, or a power grid, or a rail network, have been privatised at remarkable rates in recent decades. This has of course not been uncontroversial or uncontested, but it has nevertheless been an enormously important structural change in the functioning of many states.²

It is important to note that privatisation may take a number of forms. When privatisation is discussed, the focus is often on the sale of state-owned and state-run institutions to new private ownership—including, for example, the landmark sales of British Telecom in 1984, British Gas in 1986 and British Airways in 1987. But privatisation does not always involve a 'for sale' sign outside the front door of a public authority—it can be a broader and more subtle phenomenon. Privatisation can include, for example, opening up a government service provider to private competition, or establishing competition between state-owned entities—what might also be called 'marketisation'.³ In this case, ownership of a state entity does not (or does not necessarily) change. In market competition, however, the state entity is typically either successful because it behaves as if it were a private entity (for example, by

² See generally, eg, G Roland (ed), *Privatization: Successes and Failures* (Columbia University Press 2008).

³ See, eg, discussion in MR Freedland, 'Government by Contract and Public Law' [1994] Public Law 86; KS Jomo, 'A Critical Review of the Evolving Privatization Debate' in G Roland (ed), *Privatization: Successes and Failures* (Columbia University Press 2008); K Albertson, M Corcoran and J Phillips (eds), *Marketisation and Privatisation in Criminal Justice* (Bristol University Press 2020).

prioritising efficiency over the realisation of substantive public objectives), or it is unsuccessful and replaced by a private entity. In either case, the effect is a form of privatisation, not of assets or entities, but of the regulatory space, which becomes a space subject to market forces rather than (or at least in addition to) public policies.

Privatisation is continuously debated as a matter of economics or public policy, but it inevitably also has important legal effects. In particular, it challenges legal boundaries which depend on or reinforce public or private conceptions of particular regulatory activity. In domestic law, for example, it raises questions concerning the boundary between public and private law, as it may involve private actors exercising what are or at least what were traditionally public functions. This in turn raises fundamental questions about whether the new relationships created through privatisation—between government and the private entities carrying out what were formerly public functions, or between those private entities and the natural and legal persons affected by the exercise of their functions—are ones that are best regulated through private or public law principles or institutions.⁴ This is not to suggest that the boundary between public and private law is ever stable or fixed—it is rather under constant pressure as (public or private) actors innovate for a variety of reasons, including seeking to gain a benefit through the legal characterisation or re-characterisation of their activities.

Although much of the focus of debate over privatisation is domestic, a matter internal to each state, the impact of privatisation on the law also has an international dimension—the context which provides the principal focus of this article. This is an issue which has a rich history, as private actors have long exercised quasi-governmental authority in a way which presents a challenge to legal boundaries—just as examples, we might note the medieval *lex mercatoria*, a body of law established by private merchants, or the role of trading companies like the British East India Company in imperial expansion and rule, or the role of privateers in naval warfare and more broadly in controlling the high seas.⁵ For

⁴ See, eg, ACL Davies, ‘Public Law and Privatisation’ in D Feldman and M Elliott (eds), *The Cambridge Companion to Public Law* (Cambridge University Press 2015); T Kahana and A Scolnicov (eds), *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Cambridge University Press 2016); ACL Davies, *The Public Law of Government Contracts* (Oxford University Press 2008); Freedland, ‘Government by Contract and Public Law’.

⁵ See generally, eg, M Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (Cambridge University Press 2021), Chapters 8–10.

much of the twentieth century, however, the concerns of international law seemed quite distant from these questions. As a general matter, early twentieth-century international law was relatively agnostic as to the internal governance of a state, including its delineation of public and private spheres, and focused instead on the interactions between states in their international relations. This reflected a crystallisation of legal boundaries which emerged in the nineteenth century, with private actors and private law confined to the domestic sphere, and international law considered exclusively the law between states.⁶ Where questions of the domestic public/private boundary did arise, the concern for most of the twentieth century was not around privatisation but rather the opposite issue—state commercial activity. This phenomenon was particularly a consequence of the growth in state-owned enterprises during and in the aftermath of the first and second world wars, and of the establishment and growth of the Soviet Union, the People's Republic of China and other state-run economies. One important legal consequence of this phenomenon was the development of qualified or restrictive state immunity.⁷ If public authorities were entering the market and engaging in commercial activity in the same way as private parties, then (it was determined) they should be treated as if they were private parties, and subject to national courts and national private law, including rules of private international law. To put this simply, international law had to adapt, because sometimes what appears to be public activity (activity by a public actor) should, in fact, really be considered private. Although this phenomenon was antithetical to privatisation—an increase rather than decrease in the scope of activities of state entities—it therefore similarly presented a challenge to established legal categories which distinguished between the domains of public international law and domestic private law. Rules of state immunity must then not simply exclude state actors from national courts, but distinguish public conduct from private conduct. It is characteristic of the modern law of state immunity that it is, at least generally, not the actor but the acts that require classification—although the continuing effect of the disruption in legal boundaries may

⁶ See further, eg, A Mills, 'The Private History of International Law' (2006) 55 *International and Comparative Law Quarterly* 1; K Knop, 'Gender and the Lost Private Side of International Law' in A Brett, M Donaldson and M Koskeniemi (eds), *History, Politics, Law: Thinking Through the International* (Cambridge University Press 2021).

⁷ See generally, eg, X Yang, *State Immunity in International Law* (Cambridge University Press 2012), Chapter 1; H Fox and P Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2013), Chapter 7.

be felt in debates concerning whether it is the nature, purpose and/or context of the acts that is determinative.⁸

Particularly since the 1980s, however, a different concern has also arisen, not around state commercial activity, but rather privatisation—the performance by private parties of functions which were traditionally considered as public. In the context of international law, this has again raised challenging boundary problems, not least in the context of state responsibility.⁹ It means, for example, that the question of what counts as ‘state’ activity cannot (or cannot only) be answered by reference to the nature of the actor involved. A state cannot deny responsibility for an act or a failure to fulfil a duty which is governmental in nature, simply by allocating that function to a private party. A state cannot modify its international human rights obligations, for example, by privatising its prisons, or its police, or even its health care system (and indeed privatisation may make the fulfilment of those obligations more difficult).¹⁰ More pointedly for present purposes, and as discussed further below, a state cannot modify its duty to ensure access to justice,¹¹ both generally and particularly in relation to victims of human rights violations, by

⁸ See, eg, EC Okeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press 2018), Chapter 3; Fox and Webb (2013), Chapter 12.

⁹ See, eg, A Mills, ‘State Responsibility and Privatisation: Accommodating Private Conduct in a Public Framework’ (*EJIL:Talk!*, 4 August 2021) <<https://www.ejiltalk.org/state-responsibility-and-privatisation-accommodating-private-conduct-in-a-public-framework/>> (accessed 16 February 2023).

¹⁰ See generally, eg, A McBeth, ‘Privatising Human Rights: What Happens to the State’s Human Rights Duties When Services Are Privatised?’ (2004) 5 *Melbourne Journal of International Law* 133; K de Feyter and FG Isa, *Privatisation and Human Rights in the Age of Globalisation* (Intersentia 2005); S Palmer, ‘Public Functions and Private Services: A Gap in Human Rights Protection’ (2008) 6 *International Journal of Constitutional Law* 585; M Nowak, *Human Rights or Global Capitalism: The Limits of Privatization* (University of Pennsylvania Press 2016); P Alston, Special Rapporteur on Extreme Poverty and Human Rights, *Extreme Poverty and Human Rights*, UN Doc. A/73/396 (26 September 2018); D Birchall, ‘Reconstructing State Obligations to Protect and Fulfil Socio-Economic Rights in an Era of Marketisation’ (2022) 71 *International and Comparative Law Quarterly* 227.

¹¹ See generally, eg, F Francioni, *Access to Justice as a Human Right* (Oxford University Press 2007); see further A Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 84 *British Yearbook of International Law* 187.

privatising the mechanisms of the state through which justice is delivered.¹² This is a distinct and indeed opposing challenge to the issue which has arisen in the context of state immunity—here, the boundary between public and private again needs to be adjusted and reconceptualised, because sometimes what appears to be private activity (activity by a private actor), should, in fact, really be considered public.

These observations invite a challenging question—whether the public/private classifications in the contexts of state responsibility and state immunity, which seem to represent similar but converse designations, ought to be answered in the same way. While a complete answer to this question is beyond the scope of this article, it may be observed that in the context of state immunity, it is generally accepted that an objective international standard is required to determine whether conduct is governmental or, for example, commercial—the status of the activity as a matter of domestic law is not determinative. In the context of state responsibility, however, it is more contested whether the categorisation of activity as state or private should be carried out by reference to national law or to international standards, or indeed some combination of both. Despite pressures to the contrary (themselves heavily contested),¹³ international law has remained relatively agnostic as to the forms of state governmental organisation¹⁴ (suggesting a general deference to each state's domestic conception of what counts as 'governmental' or 'public'), but equally a state may not rely on internal rules or on the labels given to its institutional structures to evade its international responsibility¹⁵ (suggesting the need for an autonomous international approach).

¹² See, eg, *Ashingdane v United Kingdom* (8225/78) [1985] ECHR 8, holding (at [56]–[57]) that:

The applicant did have access to the High Court and then to the Court of Appeal, only to be told that his actions were barred by operation of law... To this extent, he thus had access to the remedies that existed within the domestic system.... This of itself does not necessarily exhaust the requirements of Article 6 para. 1 (art. 6-1). It must still be established that the degree of access afforded under the national legislation was sufficient to secure the individual's 'right to a court', having regard to the rule of law in a democratic society. (citation omitted)

¹³ See generally, eg, TM Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46; S Marks, *The Riddle of All Constitutions* (Oxford University Press 2003); 'Symposium Issue: International Law and Democracy Revisited' (2021) 32(1) *European Journal of International Law* 9.

¹⁴ See generally, eg, N Pavlopoulos, *The Identity of Governments in International Law* (Doctoral dissertation, UCL Faculty of Laws 2021); but see also F Mégret, 'Are There "Inherently Sovereign Functions" in International Law?' (2021) 115 *American Journal of International Law* 452 (and the symposium in (2021) 115 *AJIL Unbound* 299).

¹⁵ 'Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', *Yearbook of the International Law Commission*, 2001, vol. II, Part 2, Article 4, Commentary para 11.

The modern phenomenon of privatisation has also triggered other important international legal consequences, particularly when it has been combined with another characteristic (and also contested) structural change in the functioning of states—globalisation. For example, the combination of privatisation and the globalisation of capital flows has helped drive a massive increase in foreign investment, as foreign investors have purchased government assets, or competed in a market for government contracts for the delivery of public services. In the last 50 years, annual global foreign direct investment flows have increased (in real terms) by more than 10,000%.¹⁶ This increase in foreign investment has coincided with the emergence of international investment law, which has again provided a challenge to established public/private boundaries in modern international law.¹⁷ It is based on public international law treaties, but gives private parties the power to bring proceedings against states before privately constituted arbitral tribunals, sometimes combining treaty claims with claims based on breach of contract.¹⁸

The recent controversies over the effectiveness and legitimacy of international investment law encapsulate a broader range of questions and concerns which are perennially present in debates about privatisation. Much debate about privatisation is about its success or failure in delivering more efficient outcomes, and this is not an unimportant consideration. There is, however, more at stake in debates over privatisation than quantifying costs. There are also questions about how costs and benefits are allocated, and about the function of the public sphere—the impact of privatisation not only on value for money but also on values—discussed further in section 5 below. In investment law, these questions are reflected in debates about how much regulatory space is left for states by their commitments to protect foreign investments—how the private interests of investors (and the developmental benefits which private investment may promote) should be balanced against competing public

¹⁶ The World Bank records total foreign direct investment at \$12.36 billion in 1970 and \$2.2 trillion in 2021 (figures in current US\$) (see <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>).

¹⁷ See generally, eg, A Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (2011) 14 *Journal of International Economic Law* 469; A Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *American Journal of International Law* 45.

¹⁸ See, eg, J Crawford, 'Treaty and Contract in Investment Arbitration' (2014) 24 *Arbitration International* 351.

regulatory goals, including the state's ability to (re-)regulate privatised industries to protect public interests or fundamental rights. The literature on this question is voluminous,¹⁹ and for present purposes it may be put to one side.²⁰

This article focuses instead on a further connection between privatisation, globalisation and the development of the law, particularly the development of private law and private international law, which is under-recognised and (it is argued) worthy of greater consideration. The privatisation debate is essentially concerned with the performance of governmental functions, and whether the private sector (or at least a sector subject to private market forces) can carry out those functions 'better'. The functions of government have of course traditionally included utilities, transport, social services, and at least in some countries healthcare, and each of these areas has been a key locus for debates around privatisation and the respective roles of public regulation and markets. But there are other important governmental functions that are of particular concern for lawyers—law making, law enforcement and judicial dispute resolution. Certain aspects of these functions have also been important focal points in the context of privatisation debates—for example, the privatisation of prisons, or of police forces.²¹ Less attention has, however, been paid to these issues in the context of private law. The remainder of this article makes the argument that legal privatisation has nevertheless been taking place in the context of private law and private international law, and that this framing assists in the analysis and critical examination of this phenomenon.

¹⁹ See, eg, G van Harten, *The Trouble with Foreign Investor Protection* (Oxford University Press 2020); J Arato, 'The Private Law Critique of International Investment Law' (2019) 113 *American Journal of International Law* 1; M Waibel *et al* (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law & Business 2010); E Guntrip, 'Private Actors, Public Goods and Responsibility for the Right to Water in International Investment Law: An Analysis of *Urbaser v. Argentina*' (2018) 1 *Brill Open Law* 37.

²⁰ But see also section 4.A below.

²¹ See, eg, Albertson, Corcoran and Phillips (eds), *Marketisation and Privatisation in Criminal Justice* (2020); M Thorburn, 'Privatizing Criminal Punishment: What Is at Stake?' in A Harel and A Dorfman (eds), *The Cambridge Handbook of Privatization* (Cambridge University Press 2021); H-B Schäfer and M Fehling, 'Privatization of the Police' in A Harel and A Dorfman (eds), *The Cambridge Handbook of Privatization* (Cambridge University Press 2021).

3. *Privatisation and (Private) International Law*

The privatisation of state legal functions in the context of private law can take a number of different forms. One phenomenon is the use of private actors and private law to enforce public policies. This has traditionally been a feature of US law, exemplified in the concept of a ‘private attorney general’,²² but it is increasingly influential around the world. This reflects perspectives on private law (particularly tort law) which view it as performing a regulatory (rather than, for example, compensatory) function.²³ For example, a state government may consider that it is more efficient to enforce the safety standards of consumer products not through setting government standards and establishing licensing or inspection regimes focused on manufacturers, but through class action law suits brought by consumers or, perhaps more accurately, by entrepreneurial law firms.²⁴ This is a kind of privatised law enforcement, in which private actors are given private rights and sometimes even direct incentives (such as the award of exemplary damages) to pursue public regulatory goals. Once again, the effect of this privatisation is to challenge legal categories, as private law may be understood to be serving a public regulatory purpose.²⁵

The focus of this article is on another type of legal privatisation which, similarly to privatised law enforcement and indeed other privatisations as discussed in the previous section, raises challenges to established legal boundaries. This has taken place in the context of private international law, another area of law that has become increasingly important in recent decades. A central consequence of the rise of globalisation is that an increasing number of private legal relationships cross borders, and this raises three fundamental questions which, as is well known, are the three main questions of private international law. First, the jurisdiction question—which courts should hear any dispute which may arise.

²² See, eg, H Buxbaum, ‘The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation’ (2001) 26 *Yale Journal of International Law* 219; W Rubenstein, ‘On What a Private Attorney General Is - And Why It Matters’ (2005) 57 *Vanderbilt Law Review* 2129.

²³ See, eg, WH Boom, M Lukas and C Kissling (eds), *Tort and Regulatory Law* (Springer-Verlag/Wien 2007); P Cane, ‘Tort Law as Regulation’ (2002) 31 *Comm L World Rev* 305.

²⁴ See, eg, W. Kip Viscusi (ed), *Regulation Through Litigation* (Brookings Institution Press 2002).

²⁵ This has raised particular challenges in the context of choice of law in tort, prompting the US turn to ‘governmental interest analysis’: see further, eg, S Symeonides, *Choice of Law* (Oxford University Press 2016), Chapters 5–8.

Second, the applicable law question—which substantive law governs the relationship. Third, the question of when a court should view as decisive, that is, recognise and/or enforce, a judgment from another court (or other dispute settlement body).

A. *Private Agreements and Private International Law*

Before the late nineteenth century, national courts would always answer the jurisdiction question and the applicable law question purely by relying on what private international lawyers call connecting factors—the connections between the legal problem and different legal systems, which might be personal (based on characteristics of the parties) or territorial (based on the location of relevant events).²⁶ Judges would decide what law governs a cross-border contract by looking at where it was made, or where it was to be performed. They would decide whether there was a basis of jurisdiction in a tort claim by looking at the domicile of the defendant, or the place of the tort. These approaches were developed consistently with what are, perhaps confusingly, called the rules of ‘jurisdiction’ in public international law, which allow a state to regulate persons or conduct based once again on territorial or personal connections between the object of regulation and the state. Indeed, before the late nineteenth century, there was no clear disciplinary distinction between public and private international law.²⁷ They were both considered part of international law, and before that, of the law of nations, each of which broadly regulated matters beyond the confines of a single state. Although private international law is normally now thought of as part of the domestic law of each legal system, and indeed (as discussed further below) is now a reflection of diverse national traditions, it was conceived as part of a broader body of international law because it was understood as serving an international function—determining the allocation of regulatory authority between states in the context of private law relations, in the interest of encouraging the harmonious coexistence of diverse legal systems.²⁸ This tradition of internationalism (or multilateralism, or regionalism) remains a feature of private international law, and is part of why the subject continues to resist easy legal characterisation.

²⁶ See generally, eg, Mills, *Party Autonomy in Private International Law* (2018), Chapter 2.

²⁷ See generally, eg, Mills, ‘The Private History of International Law’ (2006).

²⁸ See generally A Mills, *The Confluence of Public and Private International Law* (Cambridge University Press 2009).

Increasingly in private international law, however, the answers to the jurisdiction and applicable law questions in cross-border private legal relations do not come from connecting factors, they come from agreements reached by the parties themselves. Instead of relying on personal or territorial connections, effect is given to clauses in contracts that provide, for example, that ‘any disputes arising in connection with this contract shall be resolved exclusively in the English courts’, and ‘this contract is governed by English law’. These types of clauses have a long pedigree, but perhaps not as long as their modern ubiquity might suggest. Until 1920, a jurisdiction agreement between two foreign parties which purported to confer jurisdiction on the English courts would not have been effective.²⁹ Whether a court had jurisdiction was considered to be a question of public power, not a matter that could be agreed on by private parties themselves. In the nineteenth century, it was considered absurd to claim that private parties could confer power on (or take away power from) national courts—it was states that were sovereign, not private parties. Private law contracts could not modify the powers of courts under public law. It was only when the 1920 Rules of the Supreme Court were adopted, a predecessor to the modern Civil Procedure Rules, that a jurisdiction agreement was recognised as a basis of jurisdiction in England.

Similarly, until about 130 years ago, a choice of law agreement in a contract would not have been considered effective in England or in most countries in the world to determine the law which governed that contract.³⁰ Until the late nineteenth century, in the English courts the applicable law for a cross-border contract was considered to be either the law of the place of contracting, or the law of the place of performance of the contract—both options evidently based on an objective territorial connecting factor, even if it was somewhat unclear which of the two applied and in what circumstances. Once again, this was viewed as a matter of public power, based on the scope of application of sovereign state laws, not a matter on which the parties could agree—private law contracts could not modify the effect of state law regulation. But by the late nineteenth century, in cross-border private contractual relations the English courts had decided to let the parties decide for themselves which law should govern their relationship.

This approach, of letting parties decide the questions of jurisdiction and applicable law for themselves, is known as party autonomy in private

²⁹ See Mills, *Party Autonomy in Private International Law* (2018) 31ff.

³⁰ See Mills, *Party Autonomy in Private International Law* (2018) 44ff.

international law. Over the twentieth century, it went from controversial to commonplace, not just in England, but in most legal systems around the world.³¹ Choice of court and choice of law clauses have become so widely accepted that they are now often considered the least controversial part of private international law. Party autonomy has been described as the ‘unifying principle’³² of modern private international law, and as ‘the one principle ... that is followed by almost all jurisdictions’.³³ States have also given these clauses indirect effect, for example, by recognising and enforcing judgments of other states where the jurisdiction of that state was based on a jurisdiction agreement, and refusing enforcement where it was contrary to an exclusive jurisdiction agreement in favour of a different court.³⁴

Why have states done this? There are various competing justifications for party autonomy in private international law.³⁵ Some are focused on benefits for the parties themselves—for example, an increase in legal certainty, and an ability to select the most appropriate court or law. Others are focused on systemic or public benefits, such as the way party autonomy transfers the costs of determining these questions from a judge to the parties themselves, and the potential benefits it may offer in facilitating competition between legal systems, discussed further below. One justification which is sometimes raised is, however, important to challenge. Party autonomy in private international law is sometimes justified as a mere application of freedom of contract—that choice of court and choice of law agreements should be given effect simply because they are contractual terms. This approach fails to recognise the significance of the development of private international law party autonomy, because it suggests that this development is merely a natural or inevitable application of contract law—even though the questions it regulates were traditionally considered to fall outside the realm of private law. To put this another way, this approach does not distinguish adequately between party autonomy in contract law (often referred to as freedom of contract) and party autonomy in private international law, viewing

³¹ See generally, eg, Mills, *Party Autonomy in Private International Law* (2018), Chapter 2; SC Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford University Press 2014).

³² Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (2014) 346.

³³ M Lehmann, ‘Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws’ (2008) 41 Vand J Transnat’l L 381, 385.

³⁴ See, eg, Mills, *Party Autonomy in Private International Law* (2018), Chapter 3.

³⁵ See further Mills, *Party Autonomy in Private International Law* (2018), Chapter 2.

the latter as merely an example of the former. This is, however, a misunderstanding of both the significance of private international law and of the role of contract law.³⁶ If the function of contract law were merely to provide optional default terms for contracts, which would apply in the absence of express clauses dealing with those points, then a choice of law agreement could be understood as a shorthand way of setting out the terms of the contract—incorporating by reference the terms provided by a particular legal system, instead of writing them down as part of the contract. A choice of law would indeed be merely a matter of freedom of contract. However, contract law does not only provide default terms, but also mandates and prohibits certain terms—it establishes the limits of freedom of contract, generally in protection of weaker parties (ensuring, to some extent, fairness in contractual terms), public values or third-party interests. It is the governing law of the contract which determines these questions. A choice of law agreement is not a matter of freedom of contract, because it is in fact the choice of law agreement which (if it is given effect) determines which contract law applies, and thus which conception of freedom of contract governs the relationship between the parties. A choice of court agreement is also different from other kinds of contractual clauses, because it seeks to determine which judicial authority has determinative power over questions of the validity or interpretation of the contract or its terms, which also determines (as discussed further below)³⁷ which legal order's mandatory rules apply. Although choice of law and choice of court agreements have sometimes been justified as merely a 'natural' consequence or extension of freedom of contract,³⁸ this reflects insufficient attention to the distinctiveness of the questions raised by these clauses, and to the challenge they present to the boundary between private law and private international law. This is not to deny that this boundary may become difficult to maintain in some contexts,³⁹ or that choice of court and choice of law agreements might be (as indeed they generally are) analysed as contractual terms,⁴⁰

³⁶ See further A Mills, 'Choice of Court and Choice of Law Agreements: Freedom of Freedom of Contract' in PS Davies and M Raczynska (eds), *Contents of Commercial Contracts: Terms Affecting Freedoms* (Hart Publishing 2020).

³⁷ See section 5.C below.

³⁸ See, eg, P Nygh, *Autonomy in International Contracts* (Oxford University Press 1999); Symeonides, *Choice of Law* (2016); see also discussion in H Muir Watt, "'Party Autonomy" in International Contracts: From the Makings of a Myth to the Requirements of Global Governance' (2010) 6 *European Review of Contract Law* 250.

³⁹ See particularly section 4.B below.

⁴⁰ See generally, eg, A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008); M Hook, *The Choice of Law Contract* (Hart Publishing 2016).

but rather to point to the particularity of the issues such agreements address.

B. *International Codification of Privatised Private International Law*

Over the course of the twentieth century different national traditions of private international law emerged in different legal systems, fragmenting its rules and challenging an internationalist conception of its function. This specialisation also led to (or reflected) a divergence of public international law and private international law, with the latter often being viewed as part of national law, and sometimes as national private law. Although party autonomy itself has ultimately come close to a matter of international consensus in private international law, it has presented a distinct challenge to the relationship between public and private international law. Public international law jurisdictional rules, which traditionally provided a framework for private international law, continue in modern international law to rely on objective connecting factors—a state may, for example, criminalise conduct in its territory, or extraterritorial conduct by its nationals.⁴¹ Party autonomy in private international law does not, however, sit comfortably within this framework, because it generally allows parties to determine the court and law which governs their legal relationship, even if the court or law they choose is entirely unconnected to them or their activities (as discussed further below).⁴²

Party autonomy in private international law may thus be seen as a cause, or at least an exemplification, of the disciplinary and technical specialisation which led to the divergence of public and private international law over the course of the twentieth century. Public international law became viewed more narrowly as the law between sovereign states, regulating the (external, and later also internal) exercise of their public authority. Private actors were not, in this model, subjects of public international law—their choices could not be determinative of, or even relevant to, questions concerning the limits of state authority. Private international law, on the other hand, governed cross-border private law relations and disputes between private parties in national courts, with parties themselves potentially selecting the outcomes of disputed

⁴¹ See generally, eg, Mills, 'Rethinking Jurisdiction in International Law' (2014).

⁴² See generally, eg, A Mills, 'Private Interests and Private Law Regulation in Public International Law Jurisdiction' in P Cragl and others (eds), *Oxford Handbook on Jurisdiction in International Law* (Oxford University Press 2019).

questions concerning regulatory authority. Thus conceived, disputes between private parties did not seem to engage public international law, and vice versa. In a sociological sense, in addition, public and private international law became increasingly distinct specialist areas of expertise, which also contributed to their sense of disconnection—especially as the expertise of private international lawyers often focused on the increasingly particular rules of each domestic system. The perceived disconnection between public and private international law has, however, always been more present in academia than in legal practice (perhaps because practical problems are seldom very respectful of disciplinary boundaries), and even in academia private international lawyers have often (but not invariably) maintained a sense of a common global enterprise.

Although the disciplines of public and private international law in some ways separated during the twentieth century, in other ways the areas of intersection between them have also grown or re-emerged.⁴³ This has arisen from developments in both disciplines, as public international law has expanded its reach into questions beyond inter-state relations (recognising, for example, individual rights of access to justice which can have jurisdictional effects),⁴⁴ and private international law has again become at least in certain respects more internationalised. Some of this internationalisation has taken place within the institutional context of the Hague Conference on Private International Law, an organisation which is a direct intellectual inheritor of the tradition of internationalism in private international law in the nineteenth century.⁴⁵ The treaties negotiated under its auspices are also, reflecting this heritage, a direct modern link between public and private international law. It is therefore particularly striking that some of the most prominent modern work of the Hague Conference is in the field of party autonomy in private international law—a phenomenon which is itself difficult to reconcile with private international law's nineteenth-century traditions. For present purposes, two instruments in particular may be highlighted, each

⁴³ See, eg, P Sooksripaisarnkit and D Prasad (eds), *Blurry Boundaries of Public and Private International Law* (Springer 2022); A Mills, 'Connecting Public and Private International Law' in VR Abou-Nigm, K McCall-Smith and D French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart Publishing 2018); Mills, *Confluence* (2009).

⁴⁴ See further Mills, 'Rethinking Jurisdiction in International Law' (2014).

⁴⁵ See further, eg, A Mills, 'Rediscovering the Public Dimension of Private International Law' (2011) 24 *Hague Yearbook of International Law* 11.

of which seeks to achieve a form of re-internationalisation of private international law, although through notably distinct techniques.

The first is the Hague Convention on Choice of Court Agreements 2005.⁴⁶ This is a treaty which obliges state parties to give effect to exclusive jurisdiction agreements in favour of Convention states—that means requiring their courts to exercise jurisdiction if they have been chosen, and not exercise jurisdiction if another court has been chosen. It also obliges states to recognise foreign judgments based on exclusive jurisdiction agreements. This treaty has come into effect for the Member States of the European Union (EU), as well as Mexico, Singapore and Montenegro, and it has been further endorsed (without legal effect) through signature (without ratification) by various other states, including the United States, the People's Republic of China and Israel.⁴⁷ It has also been signed by and come into effect separately for the United Kingdom, so that it continues to apply notwithstanding the withdrawal of the United Kingdom from the EU. As a treaty, the Hague Convention seeks to achieve its objectives through public international law—through the formal process of accession to the treaty, states agree not only to its specific terms, but also to bringing private international law (partially) back within the scope of public international law regulation. Although only a minority of states are party to this treaty, it is also nevertheless broadly reflective of general international practice.

In 2015 the Hague Conference adopted a second text, a soft law instrument called the Hague Principles on Choice of Law in International Commercial Contracts.⁴⁸ This seeks to promote party autonomy in the context of the law applicable to commercial contracts. It provides essentially a form of model choice of law rule, under which commercial parties are free to choose the law to govern contracts between them. As a soft law instrument, the Hague Principles seeks to achieve its objectives not through public international law but through exercising an influence on the development of domestic law—again seeking an international harmonisation of private international law, but without drawing on the framework of public international law. It is again broadly reflective of

⁴⁶ See generally <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>.

⁴⁷ See generally <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>.

⁴⁸ See generally <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-law-principles>.

existing practice in many states,⁴⁹ although in some respects seeks to develop the law beyond that practice.⁵⁰ It has also, as it was designed to do, influenced the practice of arbitral tribunals in determining choice of law questions (an issue discussed further below).⁵¹

Although these international instruments have not yet been adopted or implemented by very many states, they seem to reflect and support the idea that there is an existing or at least growing consensus in favour of party autonomy, and this is also reflected in the analysis of the practice of many (but not all) national legal systems.⁵² This alone is a remarkable story. Within just over a century, party autonomy has gone from absurd, to almost universal. The historical concerns about state sovereignty have been put to one side with a relatively simple argument or observation. Private parties are able to make choice of court and choice of law agreements because states (sometimes legislatively, and sometimes judicially) have adopted rules which give them this power. So private parties are not exercising power over states, they are exercising a power given to them by states—a privatised power. Indeed, party autonomy is a power given to private parties in an increasing range of contexts. In choice of law, for example, recent European regulation has extended the scope of party autonomy beyond contract law into other areas of law such as tort law, the law of succession and certain areas of family law.⁵³

C. *The Effects of Privatised Private International Law*

Even if choice of court and choice of law clauses are commonplace, however, it would be wrong to consider them as merely boilerplate, or to accept them unquestioningly as a banal feature of modern contracting practices. Rules of party autonomy in private international law have

⁴⁹ It has also directly influenced developments in the domestic private international law rules of Uruguay and Paraguay (see analysis at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6300&ctid=41>) and the adoption of regional private international law codes in Asia and Africa. See generally D Girsberger, TK Graziano and JL Neels (eds), *Choice of Law in International Commercial Contracts: Global Perspectives on the Hague Principles* (Oxford University Press 2021).

⁵⁰ See in particular discussion in section 4.B below.

⁵¹ See analysis at <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-law-principles>.

⁵² See further, eg, Mills, *Party Autonomy in Private International Law* (2018); Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (2014).

⁵³ See further, eg, Mills, *Party Autonomy in Private International Law* (2018), Chapter 8; J Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (Brill 2015).

extremely important effects. For example, the effect of party autonomy in relation to the applicable law is that States allow private parties to contract out of their contract law—or more generally, the law that would apply, but for the agreement of the parties. If the choice of law clause is in a freely negotiated contract between two commercial parties, they can (at least in some states including the UK and EU member states) even choose the law which governs any claims in tort which arise between them, as noted above. Parties can, at least to some extent and in limited circumstances, contract out of the law of negligence of the places in which they do business—the tort law that would (at least generally) apply, but for their agreement.⁵⁴ States also similarly allow private parties to agree not to be subject to the national courts of their home jurisdiction, or the jurisdiction where they breach a contract, or the courts of the place where they commit a tort. The clauses which give rise to these developments may seem unremarkable to modern lawyers, but their consequences are far from insignificant.

Part of the explanation as to how these seemingly remarkable outcomes have nevertheless become ‘ordinary’ features of commercial practice is to do with the way that private international law is thought of as a subject. One of the reasons why party autonomy was so controversial in the nineteenth century was that scholars and judges viewed private international law in a very different way than many people do today. There is a tendency today, at least in the common law world, to think that private international law is at least principally about serving the interests of the parties, and party autonomy simply seems like the best way to achieve that—if the function of private international law rules is to do what we think is best for the parties, then we should just do what the parties tell us to do (if they have given us their views). But private international law can, and it is submitted should, also be viewed through a public, rather than private perspective—it is not just about private parties and their disputes or relationships. It can also be seen as concerned with the relationship between legal systems, and in particular, the problem of how state authority over cross-border private legal relations should be allocated between them—the ‘extension’ of each state’s authority. If a legal relationship crosses borders, who should get to resolve disputes which arise in that relationship? And how should we

⁵⁴ Article 14 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007.

decide whose law should be applied to regulate that relationship, or to resolve those disputes?

Under this conception, private international law is viewed as (at least partly) serving the purpose of allocating regulatory authority between states. To be more precise, private international law may be understood as serving two different but closely related allocative functions. First, it allocates institutional authority for dealing with cross-border relationships, through rules on jurisdiction. It determines which court gets to resolve disputes which arise between the parties—who is the decision-maker? The second allocative function of private international law is that it allocates substantive authority for dealing with cross-border relationships to a particular system of private law, through rules on the applicable law. It determines whose law regulates the relationship, and whose rules will be applied to resolve disputes.

From this perspective, private international law can be thought of not as serving the private interests of private parties, but rather (or in addition) as serving an international public governance function—an approach which has been adopted and developed in a substantial modern literature.⁵⁵ It is part of the law which (imperfectly but appreciably) coordinates coexisting sovereigns, with coexisting legal orders, when legal relationships have connections with more than one state. Private international law is, from this perspective, concerned with *the regulation of regulation*, the coordination of state regulatory systems.⁵⁶ If party autonomy in private international law is viewed again from this perspective, it is cast in a different light which highlights its disruptive effect on legal boundaries. What is remarkable about party autonomy is that it allows private parties to determine the distribution of private law authority themselves in cross-border cases—that it is private parties, exercising an authority given to them by states, who are (instead of state actors) deciding which court gets jurisdiction and which law applies.

From this perspective, party autonomy can be understood as a kind of privatisation of the allocative functions of private international law, and indirectly, of this aspect of the public international law rules of

⁵⁵ See generally, eg, R Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2001) 40 *Colum J Transnat'l L* 209; H Muir Watt, 'Private International Law beyond the Schism' (2011) 2 *Transnational Legal Theory* 347; H Muir Watt and DP Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press 2014); CA Whytock, 'Conflict of Laws, Global Governance, and Transnational Legal Order' (2016) 1 *UC Irvine Journal of International, Transnational, and Comparative Law* 117.

⁵⁶ See generally, eg, Mills, *Confluence* (2009).

jurisdiction. Indeed, it is a privatisation in two forms, in combination, reflecting its dual functionality. It is a privatisation of the *institutional* allocative function, through choice of court agreements, under which the parties decide which courts have jurisdiction over them. And it is a privatisation of the *substantive* allocative function, through choice of law agreements, under which the parties decide which law applies to their relationship. The consequence is that, in cross-border cases, the allocation of private law authority between national courts and legal systems is frequently no longer carried out by states, through rules of national law, but by private parties, through contracts (albeit with the authorisation of states). Through the widespread adoption of party autonomy, states have essentially privatised an important regulatory function of global governance.

D. *The Marketisation of National Law and Dispute Resolution*

The implications of this privatisation can be understood further by considering its systemic consequences. In some legal systems, including many of the states of the United States, party autonomy is used primarily as a tie-breaker—if a legal problem has territorial or party connections with two legal systems, the parties can choose which one of them governs. Parties are limited, however, to a choice between them.⁵⁷ This narrower form of party autonomy has more limited systemic effects, because it is constrained by the framework of traditional objective territorial or party connections—it affects the *mode* of allocation of authority, but does not affect the question of *to whom* authority can be allocated.

In the common law, in the EU, and in the Hague Convention on Choice of Court Agreements and the Hague Principles on Choice of Law in International Commercial Contracts, party autonomy has, however, gone further. In cross-border cases, private parties are free to choose *any* court or *any* system of law, regardless of whether it has any connection to them or their legal relationship. They can choose a court and law which is entirely unconnected to them, because of its neutrality, or simply because they prefer it. If the legal relationship is entirely domestic, that is, lacking a cross-border element, then there might be limitations on the effectiveness of their choice—there are different approaches taken to the question of whether (or to what extent) the choice *itself* internationalises the relationship sufficiently to engage private international

⁵⁷ See, eg, discussion in Mills, *Party Autonomy in Private International Law* (2018) 360ff.

law.⁵⁸ If a private legal relationship has a cross-border element, however, the parties are (under these systems and instruments) free to choose any court and any law whatsoever—indeed, even in any combination.

In practice, as is well known, many parties choose English law and the English courts, even if neither they nor their relationship have any connection with England, and it is no coincidence that the common law is particularly open to this choice. In London, the resolution of international commercial disputes makes a significant contribution to the services economy, and London views itself as competing with other leading centres of commercial dispute resolution for this business. This kind of international competition is made possible precisely by open rules on party autonomy. Parties entering into a cross-border contract can choose from any number of jurisdictions that offer dispute resolution services, and they can choose from any number of different potential national laws. London is not unique in adopting this perspective—indeed, this competition is growing, as new specialised international commercial courts have opened across the globe, in recent years including in Singapore, Paris, Dubai, Qatar and the Netherlands.

This competition is, essentially, a form of marketisation of national law and dispute resolution services, which have become subject to globalised private market forces instead of state allocative rules. Indeed, this competition between jurisdictions is sometimes referred to simply as the ‘law market’.⁵⁹ One of the main justifications offered for party autonomy is that this kind of regulatory competition is thought to be a good thing—that it makes different legal systems work harder to compete for business⁶⁰—although there is at best limited empirical evidence which supports this idea in practice.⁶¹

In this model, party autonomy is not only concerned with the allocation of authority between different national courts or systems of law

⁵⁸ See, eg, discussion in Mills, *Party Autonomy in Private International Law* (2018) 222ff and 470ff.

⁵⁹ See generally, eg, LE Ribstein and E O’Hara, *The Law Market* (Oxford University Press 2009); H Eidenmüller, ‘The Transnational Law Market, Regulatory Competition, and Transnational Corporations’ (2011) 18 *Indiana Journal of Global Legal Studies* 707.

⁶⁰ See, eg, J Dammann and H Hansmann, ‘Globalizing Commercial Litigation’ (2008) 94 *Cornell Law Review* 1.

⁶¹ See generally, eg, T Eisenberg and G Miller, ‘The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts’ (2009) 30 *Cardozo Law Review* 1475; S Voigt, ‘Are International Merchants Stupid? Their Choice of Law Sheds Doubt on the Legal Origin Theory’ (2008) 5 *Journal of Empirical Legal Studies* 1; S Vogenauer, ‘Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence’ (2013) 21 *European Review of Private Law* 13.

which have connections with a cross-border legal relationship—it is a whole new way of justifying jurisdiction or the application of national law. In other words, it is a whole new way of carrying out the governance function of allocating authority between states—by allowing private parties to carry out that function themselves, through private contracts, and letting them ignore the traditional criteria (territorial and party connections) which have been relied on by public and private international law rules. The international allocation of law and courts to cross-border private legal relationships has, in effect, been not only privatised, but also ‘delocalised’ and ‘depersonalised’. National courts and national systems of private law have become detached from their jurisdictional moorings, free to apply wherever the parties’ consent takes them, within the globalised market of dispute resolution services. What was once part of the sphere of (public and/or private) international law, governing relations between legal systems, has become a global space of private market forces, under private (contractual) regulation. Although created by states, the law not only facilitates the freedom of parties to (for example) buy and sell goods in a variety of jurisdictions in a globalised market economy, but also a higher level freedom to select the court and law to govern a transaction, independently of the market in which the goods are traded.⁶²

4. *Privatisation of Private Law Dispute Resolution*

The transformation of the allocative function of (private) international law discussed above is undoubtedly significant, but it is not the apotheosis of party autonomy. This section discusses two further developments, which allow (or may allow) for a further privatisation of traditional governmental functions in the context of private law.

A. *Institutional Privatisation of Private Law Dispute Resolution*

It has long been established that, at least in cross-border cases, private parties are not limited to choosing national courts to resolve their disputes. They can instead use private arbitral tribunals, appointing their

⁶² See further, eg, H Muir Watt, ‘The Global Governance Implications of Private International Law’ in P Zumbansen (ed), *The Oxford Handbook of Transnational Law* (Oxford University Press 2021); ES Cohen, *Power and Pluralism in International Law: Private International Law and Globalization* (Routledge 2022).

own arbitrators instead of judges, who apply private procedural rules and not the procedural rules of state courts.⁶³ It is indeed a feature of arbitration that its procedural rules are open to customisation and negotiation by the parties, since the authority of the arbitrators is itself derived from the contract between the parties.

This is, again, a development that went from absurd to almost universal during the nineteenth and twentieth centuries.⁶⁴ In the nineteenth century, many scholars and judges argued that private parties could not possibly exclude the jurisdiction of national courts through arbitration agreements. Private parties could not take away the powers of state sovereign institutions. Once again, this apparent paradox has been resolved by simply observing that private parties can do this, if state law allows them to. It is of course well known that most states now do allow private parties to enter into binding arbitration agreements, and that the effectiveness of these agreements is reinforced through the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards—another venerable public international law codification of an aspect of privatised private law dispute resolution.⁶⁵ Although the apparent ‘sovereignty’ problem can be quickly set to one side, this remains a remarkable development. National legal systems have almost universally agreed on rules under which private parties can not only exclude the jurisdiction of their courts, but can essentially exclude the jurisdiction of *any* courts (save a residual supervisory jurisdiction),⁶⁶ replacing them with private arbitral tribunals. National courts will further generally, if required, enforce arbitral awards without (significant) review of their merits, a practice known as the principle of finality in arbitration.⁶⁷ It is important to note, of course, that in the context of

⁶³ It is notable that in some states the legal support for arbitration of domestic cases preceded its internationalisation, suggesting perhaps that the growth of arbitration was not driven by the international context. Nevertheless, it is in the cross-border context, traditionally the field of private international law, that arbitration has seen the most widespread adoption. See further Mills, *Party Autonomy in Private International Law* (2018), Chapter 2.

⁶⁴ See further, eg, Mills, *Party Autonomy in Private International Law* (2018), Chapter 2.

⁶⁵ The effectiveness of arbitration agreements, both in accordance with and beyond the requirements of the New York Convention, is also frequently reinforced through the influence of the *UNCITRAL Model Law on International Commercial Arbitration*—a soft law codification rather than a treaty.

⁶⁶ Which may, however, in some states be constitutionally necessary to ensure that judicial power is not improperly delegated: see, eg, *Costello v Ireland* [2022] IESC 44.

⁶⁷ See, eg, discussion in R Platt, ‘The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?’ (2013) 30 *Journal of International Arbitration* 531.

international investment law—discussed in section 2 above—recent years have seen a backlash against the resolution of disputes through private arbitral tribunals.⁶⁸ The concerns raised have, however, tended to focus on the desirability of what are intensely public disputes (such as the lawfulness of a state's environmental or taxation measures) between states and private investors being resolved through private tribunals without sufficient deference to the state's determination of its own regulatory interests,⁶⁹ or the adoption of specialised procedural reforms,⁷⁰ rather than raising general questions as to the desirability of privatised dispute resolution *per se*.

Although arbitration clauses remain a commonplace and seemingly unremarkable feature of modern international commercial contracting practice, their significance may be highlighted if they are considered from a governance perspective.⁷¹ It has been argued above that private international law may be thought of as being concerned with the allocation of regulatory authority in questions of private law cross-border legal relations. It has further been argued that rules of jurisdiction are concerned with the institutional aspects of that allocation—the question of who gets to decide a dispute between the parties. On this basis, it has been argued that choice of court agreements can be viewed as a privatisation of that allocative function—allowing private parties to choose themselves who gets to decide their disputes, rather than basing that decision on connecting factors determined by states. And so finally, arbitration agreements in international contracts can be thought of as engaged in a *double-privatisation*, not just of the allocative function, but of the institutional function itself.

⁶⁸ See, eg, M Waibel *et al* (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law & Business 2010); M Langford, D Behn and OK Fauchald, 'Backlash and State Strategies in International Investment Law' in T Aalberts and T Gammeltoft-Hansen (eds), *The Changing Practices of International Law* (Cambridge University Press 2018); G van Harten, *The Trouble with Foreign Investor Protection* (Oxford University Press 2020).

⁶⁹ This has led to reforms to the substantive obligations under investment treaties, although with questionable effect: see, eg, W Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (Oxford University Press 2022).

⁷⁰ See, eg, UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, https://uncitral.un.org/en/working_groups/3/investor-state; 'Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions' (2020) 21 *Journal of World Investment & Trade* 167.

⁷¹ See further, eg, F Gélinas, 'Arbitration as Transnational Governance by Contract' (2016) 7 *Transnational Legal Theory* 181; H Muir Watt, 'International Arbitration: A Critical Private International Law Perspective' in T Schultz and F Ortino (eds), *The Oxford Handbook of International Arbitration* (Oxford Academic, Oxford University Press 2020).

Through arbitration agreements, private parties can allocate the authority to resolve their disputes not only between states, but also to other private actors. The institution which is able to resolve cross-border private disputes may thus not be a judicial body created by public law, but a private contract-based arbitral tribunal. The function of national courts has thus been partially ‘privatised’, in the broader sense of that word.⁷² This privatisation has of course not involved the sale of courts themselves into private ownership—although it is true that in the United Kingdom many court buildings have been sold into private ownership in recent years, and this is more than a symbolic development as one of the justifications for reduced funding of judicial institutions is the promotion of available private alternatives.⁷³ In the international commercial context, national courts are essentially required to compete in a market, not just with each other, but with private arbitral tribunals and institutions, whose procedures are not a matter of state regulatory law, but once again, of contract. States have allowed private parties to (almost entirely) contract out of *any* national judicial system, when it comes to questions of private law.⁷⁴ In the face of this competition, national courts have sometimes also adapted to become more like private arbitral tribunals, with more flexible procedural rules, giving greater scope for the parties to customise their institutional design.⁷⁵ This is, in essence, a further form and effect of marketisation of the state dispute resolution function, which results again in a greater influence for contractual arrangements and private interests in the resolution of private law disputes, rather than public rules potentially driven by public policies.

⁷² See generally, eg, T Fisher, ‘Privatization of Legal Institutions’ in A Harel and A Dorfman (eds), *The Cambridge Handbook of Privatization* (Cambridge University Press 2021).

⁷³ See, eg, Ministry of Justice (UK), ‘Response to the Proposal on the Provision of Court and Tribunal Estate in England and Wales’, 11 February 2016, 39. On the symbolism of public court buildings, see, eg, J Resnik, ‘Whither and Whether Adjudication?’ (2006) 86 *Boston University Law Review* 1101; J Resnik and DE Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale University Press 2011).

⁷⁴ Although founded on party choice, it should also be noted that some legal systems take an expansive view of when arbitration agreements may be considered to bind third parties, challenging the foundation of arbitration in party autonomy. See further, eg, Mills, *Party Autonomy in Private International Law* (2018) 294ff.

⁷⁵ See generally, eg, S Brekoulakis and G Dimitropoulos (eds), *International Commercial Courts: The Future of Transnational Adjudication* (Cambridge University Press 2022).

B. Substantive Privatisation of Private Law Dispute Resolution

A further potential development in party autonomy, which is at least in some contexts more controversial, is the possible choice by parties of 'non-state law' to govern their legal relationship.⁷⁶ This issue emerges in a range of contexts. It can arise where two parties select a religious law to govern an agreement, such as, for example, an instrument of Sharia law-compliant finance. Parties may also purport to have their contracts governed by reference to general principles of international business, particularly as applied in international commercial arbitration, which are often referred to as the *lex mercatoria* or *transnational private law*.⁷⁷ They might also choose privately modified forms of state law, such as 'English contract law without its rules of consideration', or 'the principles common to both English law and French law',⁷⁸ or 'New York law on 1 January 2022, excluding subsequent modifications'.⁷⁹

The practice of choosing non-state law to govern a contract is not predominant, but the possibility of making such a choice has become generally accepted at least in principle in the context of arbitration, primarily because of the contractual foundations of arbitration itself.⁸⁰ Arbitrators are appointed by the parties, and they have to resolve disputes in accordance with their mandate—if the parties require an arbitrator to apply non-state law, the general position is that the arbitrators must apply non-state law. No 'sovereignty' problem arises in this context—because an arbitral tribunal is not a public law institution whose powers derive from legislation or constitutional arrangements, but a private institution whose powers derive from a private law legal instrument, a contract, the

⁷⁶ This should be distinguished from the significant role of privately generated rules which are given effect as contractual *terms*, or as informal standards—a distinct form of privatised rule-making. See further, eg, T Büthe and W Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press 2011).

⁷⁷ See generally, eg, O Lando, 'The Lex Mercatoria in International Commercial Arbitration' (1985) 34 *International and Comparative Law Quarterly* 747; T Schultz, 'Some Critical Comments on the Juridicity of Lex Mercatoria' (2008) 10 *Yearbook of Private International Law* 667; R Wai, 'The Interlegality of Transnational Private Law' (2008) 71 *Law and Contemporary Problems* 107; G-P Callies and P Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart 2010).

⁷⁸ As in the Channel Tunnel contract: see *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334, 347.

⁷⁹ On the characterisation of such 'stabilisation clauses' as a choice of non-state law, see, eg, Mills, *Party Autonomy in Private International Law* (2018) 493.

⁸⁰ The possibility of a choice of non-state law is, for example, included in the influential *UNCITRAL Model Law on International Commercial Arbitration*, which permits (in Article 28) selection of 'rules of law' (understood to include non-state law—see Explanatory Note by the UNCITRAL Secretariat, [39]).

terms of that contract dictate the terms on which the arbitration is conducted. In this context, the law chosen by the parties thereby becomes almost an extension of the contract itself—blurring the boundary between private law and private international law. To put this another way, the privatisation of the *institutional* function of private law dispute resolution has carried with it the consequence that the *substantive* legal function may also be privatised. The effect of this is that private parties can choose to have their contracts governed by forms of law which are not developed by states—which is to say, that in the law market, private parties are not limited to shopping between different state laws, but may also choose products developed by non-state actors.

An important but perhaps ostensibly surprising measure which facilitates this development is that national legal systems around the world have accepted and endorsed this practice, through their rules on the recognition and enforcement of arbitral awards.⁸¹ In most states, an arbitral award will be enforced by a state legal system, even if the award was based on the application of non-state law. National courts will, at least generally, give enforcement effect to a privately conducted arbitration, based on the application of privately generated (or modified) private law rules, without reviewing the merits of the decision.

Perhaps the final frontier of party autonomy is the question of a choice of non-state law in national *courts*. With only very limited exceptions, noted below, national legal systems at present will not directly recognise the validity of a choice of non-state law in a contract.⁸² A choice of non-state law will not be given direct effect by a court—which is to say, the court will not apply non-state law as the governing law of the contract, but will instead consider that choice invalid and seek to identify the law on the assumption that the parties have not made an effective choice.⁸³ This is true even if that court will enforce an arbitral award based on the same selection of non-state law, in which the tribunal applied non-state law as the governing law. However, this limitation is itself perhaps coming under pressure. One of the most innovative

⁸¹ See, eg, discussion in A Mills, 'The Principled English Ambivalence to Law and Dispute Resolution beyond the State' in JC Betancourt (ed), *Defining Issues in International Arbitration* (Oxford University Press 2016).

⁸² See generally discussion in Mills, *Party Autonomy in Private International Law* (2018), Chapter 10.

⁸³ Rules of non-state law may, however, be given effect as terms of the contract incorporated by reference, subject to the overriding rules of the applicable (state) law: see, eg, *Halpern v Halpern* [2007] EWCA Civ 291. See also Recital 13 to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008.

features of the Hague Principles on Choice of Law which were adopted in 2015 is that they do permit the parties to choose non-state law to govern a contract, subject to certain conditions.⁸⁴ A state which adopted the Hague Principles would require its national courts to apply not only foreign law, but also non-state law, in resolving private law disputes, if that is what the parties choose. Part of the explanation for this innovation is that the Principles were developed with their potential adoption by arbitrators and arbitral institutions in mind,⁸⁵ and as noted above the application of non-state law is at least relatively uncontroversial in that context. However, in drafting rules that may also be adopted as part of national law, the Principles may have the effect of breaking down the distinction between private and public institutional forms of dispute resolution in this respect—extending rules developed in the context of contractual arbitration to national courts, whose authority is not contractual but (at least traditionally) public. Thus far, the only states to adopt these Principles and thereby permit this choice are Paraguay⁸⁶ and Uruguay,⁸⁷ but its implicit support from the Hague Conference on Private International Law is nevertheless notable.

The significance of this development may again be highlighted from a governance perspective. As argued above, it is possible to understand private international law as being concerned with the allocation of regulatory authority in questions of private law in the context of cross-border legal relations. Applicable law rules can be understood, in particular, as being concerned with the substantive aspects of that allocation—the question of what rules regulate the relationship between the parties. Further, choice of law agreements can be understood as a privatisation of that allocative function—allowing private parties to choose themselves what law governs their relationship, rather than basing that decision on connecting factors determined by states within an international legal framework. Finally, we can think of the possible choice of non-state law, at least in arbitration but also in some national courts, as another

⁸⁴ See discussion in section 5.B below.

⁸⁵ See Principles on Choice of Law in International Commercial Contracts, Commentary I.20 (available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>).

⁸⁶ See Article 5 of Paraguayan Law 5393 of 2015, 'Regarding the Applicable Law to International Contracts', English translation available at https://assets.hcch.net/upload/contractslaw_py.pdf.

⁸⁷ See Article 45 of Uruguayan General Law of Private International Law, C/619/2020, No.130, which allows a more limited choice of non-state law.

double-privatisation, not just of the allocative function of private international law, but of the substantive function of private law itself.⁸⁸

The effect of this form of party autonomy is that private parties can not only allocate regulatory authority between systems of national law, selecting which one governs their legal relationship, but can also (at least in some contexts) take this law-making authority away from states and confer it on other private actors—for example, religious groups, or the community of commercial arbitrators. National contract laws are not just competing with each other for choice by international commercial parties, they are also competing with non-state alternatives—privately created private law. If choice of non-state law is permitted, the marketplace of laws is expanded to include both state and non-state forms of law.

5. *Evaluating the Privatisation of Private (and) International Law*

This article has argued that party autonomy in private international law can be viewed as a privatisation of certain international and national governance functions—(i) an allocative function, (ii) an institutional function and (iii) a substantive law function. Thinking about party autonomy as a form of privatisation opens up and invites further critical reflection on a number of questions, drawing on the broader debates around privatisation in other contexts. The analysis in this section focuses on three key concerns that are raised in relation to privatisation in general and which might also be raised in relation to the specific forms of privatisation highlighted in this article: questions of (i) efficiency, (ii) distributive effects and (iii) regulatory effects.⁸⁹ These questions may be asked not only of the private international law determination itself (the process under which a decision is made as to forum or applicable law)

⁸⁸ See further, eg, R Michaels and N Jansen, 'Private Law beyond the State? Europeanization, Globalization, Privatization' (2006) 54 *American Journal of Comparative Law* 843; A Stone Sweet, 'The New Lex Mercatoria and Transnational Governance' (2006) 13 *Journal of European Public Policy* 627; R Michaels, 'The True Lex Mercatoria: Law Beyond the State' (2007) 14 *Indiana Journal of Global Legal Studies* 447.

⁸⁹ As noted below, these are broadly (although not precisely) analogous to the three 'approaches' to privatisation identified in A Dorfman and A Harel (eds), *The Cambridge Handbook of Privatization* (Cambridge University Press 2021).

but also of its consequences for the resolution of disputes between the parties.

A. *Efficiency*

One of the main justifications for privatisation is efficiency, but those who challenge privatisation often question whether private actors subject to market pressures and operating with a motive to increase profits are really more efficient at delivering public services than state actors.⁹⁰ This question might equally be asked about the allocative, institutional and substantive functions whose privatisation through private international law has been discussed in this article—does party autonomy lead to better decisions and/or lower decisional costs?⁹¹

(i) *Allocative Function*

If we consider, for example, the allocative functions of private international law, it is notable that efficiency has not traditionally been a goal of public international law jurisdictional rules, which seek to delimit state power based on the concerns of demarcating public authority rather than private convenience. Public international law jurisdictional rules do not give a state authority to prosecute a person merely because they provide the tribunal which will be able to do so most efficiently, because, for example, the evidence and witnesses are now located there; nor do they prioritise competing exercises of jurisdiction on the basis of relative efficiency. Efficiency is, however, more present as a value in private international law, and often put forward as a justification for party autonomy. In particular, two efficiencies are frequently claimed—efficiency in terms of the allocative private international law decision itself, and efficiency in terms of the (subsequent) resolution of disputes.

Party choice in relation to the allocative function suggests the obvious benefit that the parties may be able to determine the most suitable court and law for their relationship in a way which is more efficient than national courts. Party autonomy does take the burden of determining jurisdiction and the applicable law away from the courts, at least in most

⁹⁰ See further, eg, discussion of 'outcome-based' approaches to privatisation in Dorfman and Harel (eds), *The Cambridge Handbook of Privatization* (2021), Part III; Jomo, 'A Critical Review of the Evolving Privatization Debate'.

⁹¹ On the meaning of 'efficiency' in this context, see also J Kirby, 'Efficiency in International Arbitration: Whose Duty Is It?' (2015) 32 *Journal of International Arbitration* 689.

cases and to a significant extent. It should be noted, however, that party autonomy itself can still be the subject of judicial disputes, for example, in relation to the interpretation of ambiguous clauses, or where the law imposes potentially applicable constraints on party autonomy. In considering the effect of any privatisation, it is important to take into consideration the frequent need to provide continued supervision of (and intervention in) the market which has been created—party autonomy is no exception. Whether or not this constitutes a net efficiency gain, however, it is at least generally a benefit to the state in reducing judicial work. In addition, parties are certainly better placed than judges to know their own interests, and there is no cost to them in acquiring this knowledge which is an efficiency benefit in determining private international law questions which must, at least in part, take into account those interests.

To make a choice of court or choice of law, however, requires more than knowledge of the interests of the parties. The efficiency of a choice of court or choice of law should be measured not only in terms of reduced cost but also the achievement of appropriate outcomes, which will also require some knowledge of the different institutions and substantive rules from which a selection is to be made. In some cases, it is possible that courts may make more efficient judgments about choice of court and choice of law questions because of the expertise of judges, and because of the different range of factors taken into account by a court in making its decision. An inexperienced party or lawyer negotiating a choice of court or choice of law question would face great expense to determine which court or law is likely to be most suitable for them, while a judge may more easily be able to identify, for example, the habitual residence of the seller in a sale of goods contract.⁹² In practice, parties or their lawyers are unlikely to incur these expenses, and will instead rely on familiarity rather than any comparative analysis, and hope that their counter-party does not equally insist on the court or law most familiar to them. This may make the choice itself less costly—one party might propose a familiar court or law, and the other might simply accept rather than face the costs of determining whether a better choice is available—but it does not mean that the choice is ‘efficient’ more

⁹² Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, Article 4(1)(a).

broadly speaking.⁹³ In particular, it does not mean that the litigation itself will be conducted efficiently, as the court or law chosen by the parties may in fact be quite inefficient in the context of the dispute which arises between them.

This is particularly the case because a party choice of court or choice of law will almost always be made at the time a contractual relationship is established, before the nature of the legal dispute which later arises is known. Party autonomy affects not only the identity of the decision-maker, but also the time at which the decision is made. If the parties do not make a choice, courts will determine the appropriate court and law with at least some knowledge of the characteristics of the specific dispute before them—potentially selecting a more efficient forum than would have been selected by the parties in advance, who are only in a position to try to predict the potential disputes that may arise, and must (or at least almost invariably will) make a single choice for all of them. This factor is more significant in relation to questions of jurisdiction than choice of law, because in the latter context the court would be determining the law applicable to a contract as a whole, generally without regard to the characteristics of the specific contractual dispute which has arisen. However, if the parties have effectively chosen a law for non-contractual claims,⁹⁴ this does take away the possibility that the courts would select a more appropriate law for a specific non-contractual claim which later arises between them, as the selection by a court will be made in relation to the specific cause of action before it, not the legal relationship between the parties in general.

Another temporal concern is that the court chosen by the parties may end up being less efficient, because by the time proceedings are commenced, the defendant does not have assets located in the selected forum's territory. This would mean that the dispute must be resolved in the chosen court (unless both parties agree otherwise, which is unlikely in the context of a dispute), but additional proceedings in another jurisdiction will be required to enforce the judgment, which will add delay and expense. This inefficiency might be avoided if a court were determining the most appropriate and efficient forum for a particular dispute, taking into account the location of relevant assets at that

⁹³ Although more complex systemic efficiency gains may be possible where one party is a 'repeat player' and is effectively able to select the same court and law for a large number of transactions, reducing overall costs: see, eg, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

⁹⁴ See discussion in section 3.C above.

(later) point in time,⁹⁵ with the capacity to freeze assets in that location if necessary to ensure they are preserved for a subsequent judgment.⁹⁶ Although party autonomy transfers the costs of allocating regulatory authority from a court to the parties, and so decreases the public costs of determining the forum and applicable law for a dispute, this may come at the risk of giving effect to a choice by the parties which actually makes the resolution of the dispute significantly less efficient as it is made from a position of relative blindness as to the nature and context of the (future) proceedings.

There is, however, a further significant factor which should be added to this analysis. Many disputes which are litigated are settled after the private international law questions are determined, because the principal difficulty which the parties faced in settling their dispute was uncertainty around jurisdictional and applicable law questions. Even if determination of these questions in advance by the parties (through exercises of party autonomy) imposes costs on the parties, and even if their choices are imperfect, they have the great benefit of increasing legal certainty for the parties in terms of their respective rights and obligations, generally without the need for judicial clarification.⁹⁷ This is likely to aid not only in settlement of disputes, but also in their avoidance. This perhaps applies most obviously in relation to choice of law, which determines the substantive law governing the relationship between the parties and thereby assists in understanding their respective rights and obligations, but also applies in relation to a choice of court, which determines the applicable procedural rules as well as potentially mandatory statutory provisions, as well as potentially the applicable choice of law rules including the permitted scope of party autonomy.

(ii) *Institutional Function*

Similar considerations arise where the parties select institutionally privatised dispute resolution through arbitration. One of the arguments often made in favour of arbitration is that it allows the parties to customise

⁹⁵ A factor which is given significant weight as part of the English *forum (non) conveniens* test—see, eg, *Colt Industries v Sarlie (No 1)* [1966] 1 WLR 440.

⁹⁶ Sometimes known in England as a ‘Mareva injunction’, after the landmark decision in *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd’s Rep 509.

⁹⁷ See generally, eg, J Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (Brill 2015).

procedural rules, and thereby to create a more efficient forum than any available national court.⁹⁸ There are three difficulties with this claim.

The first is that designing procedural rules at the time of contractual negotiations would impose a significant additional cost on the parties, and they are unlikely to invest substantial resources in the decision, which means their decision is more likely to be based on familiarity (or the selection of an ‘off-the shelf’ institutionalised arbitration model) than an efficiency-maximising calculation.⁹⁹ The potential efficiency gains from customising dispute resolution procedures may be outweighed by the costs of actually having to design those procedures.

The second difficulty is that the parties are determining whether or how to resolve their disputes through arbitration from a position of uncertainty as to the nature of the dispute which in fact later arises between them, as noted above in relation to the selection of a court. This makes it highly unlikely that they will be able to customise dispute resolution procedures in a way which maximises efficiency, or indeed make a determination as to whether arbitration or judicial dispute resolution would be more efficient to resolve a later dispute. Even more predictable factors, such as the confidentiality of arbitral proceedings, may work for or against a party depending on their specific circumstances in relation to a dispute which subsequently arises. Arbitration also has some well-known but unpredictable disadvantages, like the inability to join third parties without their consent, which may fragment complex disputes—it may be difficult at best for the parties to predict whether their choice of arbitration will have the undesired effect of decreasing the efficient resolution of a dispute involving other parties (or other claims) not covered by the arbitration agreement.

The third is that resolving a dispute through arbitration, perhaps in part because of the greater flexibility of arbitral procedures, is frequently no more efficient than judicial dispute settlement.¹⁰⁰ Indeed, as discussed further below, it may in some cases be less efficient because of the additional cost of judicial enforcement proceedings in the absence of

⁹⁸ Historically it was also often claimed that arbitration was inherently more efficient than judicial dispute resolution, because it was faster and more streamlined, but this claim is today made less confidently if at all.

⁹⁹ See, eg, L Mistelis, ‘Efficiency – What Else?: Efficiency as the Emerging Defining Value of International Arbitration: Between Systems Theories and Party Autonomy’ in T Schultz, F Ortino and J Mitchenson (eds), *The Oxford Handbook of International Arbitration* (Oxford University Press 2020). There are, however, also potential systemic efficiency gains through network effects: see, eg, T Ginsburg, ‘The Culture of Arbitration’ (2003) 36 *Vand J Transnat’l L* 1335.

¹⁰⁰ See discussion in Mistelis, ‘Efficiency – What Else?’.

voluntary compliance with the award, as well as the costs of paying for the services of arbitrators and hiring a venue for the arbitration, which are generally higher than court costs. Once again, the additional judicial cost is an example of the general issue that privatisation commonly requires continuing supervision of markets, which carries a cost that detracts from any efficiency benefits otherwise gained. An additional concern in this context is that it may be unclear to the parties where the arbitral award will need to be enforced, which means that it may be unclear what mandatory rules or considerations of public policy need to be taken into account to ensure that an enforceable award is rendered. This makes the desirability of arbitration itself difficult to determine. It also means that if an arbitral award is set aside as unenforceable, and the matter sent back for further arbitral proceedings or taken on by a court, any possible efficiency gains through the adoption of an arbitration agreement are likely to be outweighed by wasted costs.

Nevertheless, despite these limitations, the effect of an arbitration agreement is again to provide at least potentially greater clarity to the parties as to the means through which disputes between them would be resolved. This allows them to calculate more clearly the costs and benefits of litigation, and thereby to avoid or settle disputes. The fact that an arbitral award may be relatively readily enforced around the world, pursuant to the New York Convention 1958, is an additional efficiency benefit, not only because it may reduce the cost of enforcement proceedings, but also because it will increase the likelihood of voluntary compliance. It should be noted, however, that one of the intended effects of the Hague Choice of Court Convention 2005 is to replicate this benefit in relation to jurisdiction agreements, by streamlining the recognition and enforcement of judgments based on exclusive choice of court clauses, 'levelling the playing field' between judicial dispute resolution and arbitration.¹⁰¹ Although this effect is thus far limited as the number of parties to the Hague Choice of Court Convention is significantly less than the New York Convention,¹⁰² both Conventions nevertheless offer a potential efficiency benefit not only in facilitating a choice by the parties of the form of dispute resolution which is most

¹⁰¹ See, eg, LE Teitz, 'The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration' (2005) 53 *The American Journal of Comparative Law* 543, 544.

¹⁰² For the parties to the Hague Convention, see section 3.B above (32 parties). For the New York Convention, see https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (171 parties).

suitable to them or their legal relationship, but in streamlining enforcement proceedings themselves.

(iii) *Substantive Function*

The efficiency impact of a privatisation of substantive private law, through the selection by the parties of non-state law, is perhaps more uncertain. Non-state law may offer the possibility for the parties to customise the applicable legal rules to govern their relationship, in a way which may be tailored for a particular industry or form of legal relationship. In many cases, the selection of non-state law may primarily serve the role of providing a set of default rules to 'fill the gaps' of a contract—to that extent, it may be viewed as more efficient than requiring the parties to draft and negotiate those rules individually (although as noted above the law might obtain this same benefit by allowing incorporation by reference even if a choice of non-state law is not permitted). The possibility of choosing non-state law may also have an efficiency benefit because it increases the number of available systems of law, increasing the likelihood that a set of rules may be readily selected which is most suitable for the specific legal relationship.

Again, however, this comes with the difficulty that this choice must be made without certain knowledge of the nature of any dispute which may subsequently arise. The impact or effectiveness of a choice of non-state law will, in addition, be questionable unless accompanied by an arbitration agreement,¹⁰³ which means the choice of applicable law imposes limitations on the available forum—potentially with an efficiency cost, as arbitration might not otherwise be the parties' optimal choice. Party benefits in terms of legal certainty may also be reduced because it may be more difficult to identify the precise content of non-state legal rules, and this may also add complexity and expense to arbitral proceedings. Finally, if judicial enforcement of an arbitral award based on non-state law is subsequently required, it will generally not be an obstacle *per se* that the award was based on non-state law (as noted above), but a review may be required of whether the arbitral proceedings including the applicable law were compatible with the public policy of the forum in which enforcement proceedings are taking place—a forum which may again be unpredictable even at the time the arbitration is occurring, let alone at the time the parties are negotiating the terms of their contract.

¹⁰³ See discussion in section 4.B above.

B. *Distributive Effects*

Another important angle from which an evaluation may be made of privatisation in general, and in particular the form of privatisation associated with private international law in this article, is in relation to its distributive effects. The concern here is not about the size of costs, but the distribution of both costs and benefits. Privatisation allocates decisional responsibility from a public actor to a private actor (or actors), which not only raises questions around precisely how decisional costs are met and what effects that may have on decision-making, but also around how decisions themselves may allocate further costs and benefits.¹⁰⁴

(i) *Allocative Function*

The simplest distributive effect of privatisation is in relation to the allocative decision itself—the determination of which court and law has authority over the legal relationship or dispute. Party autonomy means that both the power and costs of that decision are transferred from a judge to the contracting parties. The most evident distributive effect of this transfer is a public saving in reducing judicial workload. As noted above, that workload is of course not eliminated entirely—a judge may still need to review the scope and limitations of the choice of court or law made by the parties—but it is generally reduced, as this is likely to be a less complex decision than the determination (in the absence of party choice) of which court should have jurisdiction over their dispute and which law should govern their relationship.

It is, however, necessary to consider further indirect effects of this allocation. Where the parties exercise their autonomy (in the private international law sense), the decision regarding the court or law with authority over them is now made primarily in the context of a negotiation—part of the marketplace—rather than as a matter of application of legal principles by a judge. Negotiations over which court or law should have authority may as a consequence reflect the relative power and information differentials of the parties, rather than converging on a single option which is most suitable for the relationship. To put this another way, while a judge selects a court or law based on the nature of the dispute or relationship, in a negotiation each party will be motivated by choosing the court or law which is best for them individually, and

¹⁰⁴ See similarly, eg, discussion of ‘agency-based’ approaches to privatization in Dorfman and Harel (eds), *The Cambridge Handbook of Privatization* (2021), Part I.

where this differs between the parties the outcome may be a decision in favour of the party with a stronger negotiating position rather than the outcome which is most beneficial for the relationship as a whole. It is, of course, true that where decisions about jurisdiction or applicable law are left to the court (where the parties do not make a choice of court or law), their differences in relative resources may still have an impact on these questions, as the stronger party may be able to call on more effective legal representation and make a more powerful case for their preferred court or law. However, the impact of these differences is at least softened by the fact that ultimately the decision will be made by a judge on the basis of rules of law, rather than left to marketplace negotiations. The key point is that the privatisation of decision-making responsibility in this context carries with it a marketisation of the decision-making process, which affects the distribution of costs from public to private actors, but is also in turn affected by the relative ability of the private actors to bear those costs. The questions of jurisdiction and applicable law are themselves 'commodified', in the sense that they become part of the negotiated terms of the agreement, like the price or quantity of goods to be supplied, rather than a legal framework within which the contract is given effect. This is not necessarily a criticism—some may agree that this is precisely what is taking place and consider it a positive development¹⁰⁵—but the question should at least be asked whether decisions about jurisdiction or applicable law are matters that ought to be treated the same way as other contractual terms.¹⁰⁶

The distributive effects of party autonomy are, however, not limited to the determination of the private international law questions themselves (the process under which a decision is made as to forum or applicable law) but also include consequences for the resolution of the dispute between the parties. The ability of the parties to choose which court has authority to resolve disputes subsequently arising between them also involves an allocation of the economic benefits of that task, particularly for the legal community on whose expertise resolution of the dispute will depend. It is true that a large caseload may be viewed as a burden on a judicial system, and some legal systems may be selective in the types

¹⁰⁵ As noted in section 5.A above, there may even be efficiency gains where a party entering into a large number of transactions is able to secure the same forum and law for them all.

¹⁰⁶ See further section 3.A above.

of cases they are interested in attracting.¹⁰⁷ As discussed above, however, many others at least recognise that attracting international commercial disputes contributes to the local economy and seek to promote themselves accordingly, and facilitate this choice by allowing the parties to choose their courts without requiring any substantial connection between them or their dispute and the forum.¹⁰⁸ Giving the parties a free choice of forum means that the distribution of this economic benefit does not reflect questions of where the underlying economic activity is taking place (such as where the contract had to be performed), but rather a more specialised question of which courts or tribunals are preferred by international parties—with the English courts, among others, being a major beneficiary of these market forces, as also discussed above. There are of course efficiency benefits in this concentration of case law—the English courts in particular have developed expertise in dealing with the range of complex issues which may arise in litigating complex international disputes, which may assist in their efficient resolution (and has a self-reinforcing effect, as the expertise created by extensive practice attracts further practice and further development of expertise).¹⁰⁹ There is, however, also a distributional aspect to this, which means that many of the world's international commercial disputes are resolved through litigation in the courts (or, as discussed further below, arbitral tribunals) of London, Paris, Singapore and New York, among others, regardless of where the underlying business activities are carried out.¹¹⁰ Payment for these services will require a transfer of resources, a concentration of wealth from around the world—perhaps particularly from litigants based in developing countries whose courts are unlikely to be selected in international contracts because of concerns over their resourcing or independence. Indeed, the more that developing state courts are 'deselected' through choice of court agreements, the less opportunity they will have to gain the experience of dealing with complex international cases, and the greater the risk they will continue to be bypassed. This is not just significant in terms of its allocation of wealth-generating economic activity (the increasingly important professional services economy), but also (as discussed further below) for the impact it may have

¹⁰⁷ In New York, for example, claims by non-residents against non-residents brought on the basis of a New York jurisdiction agreement are only permitted where the claim is based on a contract with consideration valued at one million dollars or more: New York Consolidated Laws, General Obligations Law - GOB s.5-1402.

¹⁰⁸ See section 3.D above.

¹⁰⁹ As discussed in section 5.A above.

¹¹⁰ See generally, eg, Wai, 'Transnational Liftoff and Juridicial Touchdown'.

on the ability of third parties or public interest groups to observe or intervene in locally significant litigation.

Even if focus is limited to the parties themselves, party autonomy has another important distributional effect. As discussed above, leaving the decision about forum or applicable law to negotiations rather than determining these questions as a matter of law raises the concern that the allocation will reflect relative power disparities between the parties. One further impact of this is that the party in a stronger negotiating position may choose a forum and law not only because it provides preferable procedural or substantive rules for that party, but because it presents that party with some form of material advantage. For example, the party might choose their home court and law, even if it might not be the most advantageous for them or for the relationship, because they are already very familiar with those systems, and because their foreign counter-party does not have any such familiarity, which means that they are at a relative disadvantage when it comes to determining their rights and obligations under the contract and indeed litigating. Put simply, power inequalities may not just affect the choice of court or choice of law made by the parties, but may also lead to the selection of a court or law which further exacerbates that inequality by imposing asymmetrical dispute resolution costs.

(ii) Institutional Function

The institutional privatisation of private law dispute resolution, through the use of an arbitral tribunal, also carries distributive consequences. As noted above, party autonomy does not just transfer power but also decisional work to the parties, and the potential selection of a range of different arbitral institutions and the possibility for customisation of their procedural rules adds complexity to the choice of forum process, increasing the resources required for a party to make an 'ideal' choice. This increases the possibility that a party with greater resources and a stronger negotiating position will be able to obtain its preferred forum, even if it is not the most suitable for the relationship or dispute.

The most significant effect of permitting selection of an arbitral tribunal instead of a national court, however, is its allocation of the dispute resolution function to a private actor (or actors, if multiple arbitrators are selected) rather than a publicly employed state agent (a judge). The potentially important regulatory effects of this choice are discussed below. Its distributional effects include most obviously the reduction of judicial workload—the transfer of dispute resolution work from the

public to private sector. Whether this is necessarily a benefit is a matter on which those of different ideological persuasions are likely to differ. The transfer of work is, of course, not total, and (as noted above) this raises efficiency concerns, because an arbitral tribunal does not itself have enforcement powers (as it cannot draw directly on the police powers of the state) and the state enforcement of an arbitral award will, at least to some limited extent, generally require a judicial review of its lawfulness.¹¹¹ The validity of an arbitration agreement, for example, is likely to be determined both by a tribunal and by a court, creating some duplication of work, even if the latter may give some degree of deference to the decision of the former.

There is also an international dimension to this choice, as parties may choose arbitrators and an arbitral seat located anywhere in the world—a possibility enhanced by the relative ease in enforcing arbitral awards internationally pursuant to the New York Convention 1958.¹¹² This choice does not just allocate decisional responsibility, but again also the economic benefit of the associated services, in this context including not just the fees payable to the lawyers and other advisers but also the arbitrators themselves. Although there are a number of centres of arbitration competing for this work, and there are efficiency benefits in the development of expertise, a by-product of this specialisation is that there is a concentration of the wealth generated by dispute resolution services in a small number of (developed world) jurisdictions, and a transfer of resources away from litigants (particularly those based in the developing world). There may be benefits to this transfer, for example in unburdening the court system of a developing world state which is inadequately resourced, but they must be evaluated alongside the incidental costs to that state's services economy and the consequential inhibition of its development.

(iii) *Substantive Function*

The possibility of a choice of non-state law, analysed in this article as a form of privatisation of private law's substantive regulatory functions,

¹¹¹ This is analogous to a general concern with privatisation, noted above, that the state incurs additional costs in monitoring and reviewing the performance of private actors or marketplaces: see, eg, Jomo, 'A Critical Review of the Evolving Privatization Debate'. On the role of courts in arbitration, see, eg, A Mills, 'Arbitral Jurisdiction' in T Schultz and F Ortino (eds), *The Oxford Handbook of International Arbitration* (Oxford University Press 2020).

¹¹² See generally, eg, Wai, 'Transnational Liftoff and Juridicial Touchdown'.

most evidently has a strong regulatory effect which is examined in the next section. It also, however, has distributive effects. First, it adds still further complexity to the choice of law decision—private parties can select not only between the state legal systems of the world, but may also select privately generally non-state alternatives. While this may create the possibility for a better choice, it also decreases the likelihood that parties, particularly those with limited resources, are actually able to make an optimal choice. It also increases the likelihood that power or information differentials between the parties are likely to lead to a choice which is more favourable to the stronger party. These concerns might potentially be addressed by limiting the choice of non-state law—the Hague Principles on Choice of Law in International Commercial Contracts, for example, permit a choice of non-state ‘rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise’.¹¹³ The requirement that the law be ‘neutral’ and ‘balanced’ (or at least be generally accepted as so) may reduce the risk that a non-state law which is heavily favourable to one party is chosen. These conditions, however, risk adding greater complexity and uncertainty to the choice of law process (both in its initial negotiation and subsequent arbitral or judicial review), which, in addition to challenging potential efficiency gains, exacerbates concerns about whether this shifting of costs from the public to private sector also has distributive consequences between the parties.

Beyond the private international law decision itself, the possibility of a choice of non-state law also has a distributive effect in relation to law-making power. If contracts may be regulated by non-state rules generated by private actors, this increases the power of those actors in comparison with national private lawmakers, who may be either legislatures or judges. Some judges have recently expressed concern that arbitration is slowing the development of the common law—affecting its agility as a legal system—because more cases are being heard (confidentially) by private arbitrators rather than public judges who are able to not only apply but also develop the law.¹¹⁴ This concern is perhaps increased further if the parties choose for their disputes to be resolved pursuant to non-state law, as there is no decision on the application of national law at all, and thus no possibility even for this decision to be reviewed at the point when a national court is considering recognition and enforcement

¹¹³ Article 3.

¹¹⁴ See further discussion in section 5.C below.

of an arbitral award (although the award may be reviewed in other respects). Concerns about the decline in judicial law-making power go hand in hand with questions about where that power is now residing. The distributive impact of a court or arbitral tribunal giving effect to non-state law also includes empowering the private parties responsible for the generation of that law—which raises questions about the interests and accountability of those parties.

C. *Regulatory Effects*

Perhaps the most obvious impact of privatisation is in relation to its regulatory effects—in changing the identity of the party exercising a power or making a decision, and the context for the exercise of that authority, privatisation can impact the factors which are taken into consideration in decisions and thereby their outcomes.¹¹⁵ Privatisation does not just raise questions about value for money, but also about values. This concern, that privatisation may have a ‘distorting’ effect on regulation, is also present in the context of private international law.

(i) *Allocative Function*

In the absence of party choice, when national courts are making decisions about jurisdiction or the applicable law (or at least when national lawmakers are designing rules on jurisdiction or choice of law), one important set of considerations are the interests and expectations of the parties themselves. In respect of these factors, party autonomy in general terms may be considered not to offer a distortion, but rather a more accurate way of identifying these interests—by allowing for them to be identified by the parties. This is perhaps the strongest argument in favour of party autonomy—that at least to the extent that decisions on jurisdiction and the applicable law are driven by an understanding of party interests and expectations, the most efficient and effective way of gauging those factors is by allowing the parties themselves to make the relevant decisions. There are, however, two concerns that might be raised with this argument.

¹¹⁵ See similarly, eg, discussion of ‘process-based’ approaches to privatisation in Dorfman and Harel (eds), *The Cambridge Handbook of Privatization* (2021), Part II. The regulatory impact of privatisation may indeed sometimes be its motivating force: see, eg, JD Michaels, ‘Privatization’s Pretensions’ (2010) 77 *University of Chicago Law Review* 717.

First, the establishment of a choice of court or choice of law agreement between the parties does not necessarily mean an assessment of their collective interests. As discussed above, in the context of a negotiation between unequal parties, the interests of the stronger party may prevail, in a way which would be less likely to happen if the decision were made by a judge in the context of an objective determination of forum or applicable law. Although determinations of jurisdiction and applicable law by the parties will often involve many of the same factors which would be applied by a court, leaving the determination of these factors to marketplace negotiations may itself have a distorting effect on the way they are aggregated where the parties have competing interests. This may, for example, leave one party with a stronger ability to access the chosen court than another. Arguments as to whether jurisdictional rules unduly restrict access to justice generally invite the response that there is only a right to a court, not to any particular court,¹¹⁶ and the latter is a matter which may at least generally be left to negotiation between the parties—but not all courts are equally accessible in practical terms, even if in a formal sense their availability is assured by a jurisdiction agreement. Again, as noted above, some may consider this appropriate and unproblematic (and indeed even desirable for parties to be able to trade litigational convenience for other contractual benefits), but it is at least an impact which requires evaluation.

Second, and perhaps more significantly, decisions on jurisdiction and the applicable law made by courts are not exclusively based on the private interests of the parties, and party autonomy may exclude these considerations. In some legal systems, public factors are overtly identified as part of relevant rules. For example, when a US federal court is considering whether to stay proceedings in favour of an alternative forum, it takes into account public interest factors, such as court congestion, the burden of jury duty on a local population, and the 'local interest in having localized controversies decided at home'.¹¹⁷ While parties may be to some extent attentive to court congestion in identifying an efficient forum, they are highly unlikely to take into account public or third-party interests in negotiating a jurisdiction agreement. Similarly, in the context of the applicable law, in the absence of party choice many US states determine the applicable law by taking into account the competing governmental interests, which may be based on an identification of relevant connecting factors and of the scope and purpose of potentially

¹¹⁶ See, eg, *OT Africa Line v Hijazy "The Kribi"* [2001] 1 Lloyd's Rep 76.

¹¹⁷ *Gulf Oil Corp. v Gilbert*, 330 U.S. 501, 509 (1947).

applicable statutory instruments.¹¹⁸ A choice of law agreement between the parties will not, however, be based on a consideration of which state has the strongest interest in regulating their relationship, but on their own private interests.

In other legal systems, such as English law, such ‘public interest’ factors are not overtly identified, but they are embodied in the rules which apply in the absence of party choice. Private parties are focused on the court or law which is most suitable for them, and in general (as noted above) party autonomy allows them to make a free choice regardless of their location or the location of their legal relationship. In the absence of party choice, courts make a determination of jurisdiction or the applicable law based on objective connecting factors—these are not only concerned with party interests but also reflect an evaluation of competing state interests. Jurisdiction may be based on a conception of the defendant’s home, but may also, for example, be based on the place of performance of a contract, or the place of commission of a tort. The applicable law may, for example, be based on the location of a contracting party or of the damages caused by a tort. Reliance on these connections may be justified on the basis that, in the absence of party choice, they are likely to point to the forum or law most convenient or appropriate, but they also reflect questions of whether the authority of a particular court or law may justifiably be asserted over a particular dispute—courts do not (at least generally) take jurisdiction *merely* because they would be the most efficient forum, in the absence of party choice in their favour or any objective connecting factors linking the parties or their dispute to the forum. (Some courts may exercise jurisdiction where there is no other alternative forum at all, through what is known as ‘forum of necessity’ jurisdiction, but that involves more fundamental considerations of justice rather than party interest in efficiency.)¹¹⁹ The general point is that private international law decisions are made differently when made by private parties, and thereby that privatisation of these decisions does not just change who is making the decision, but affects how and on what basis the decision is made.

One effect of unrestricted party autonomy, already noted above, is that the courts or law which regulate a relationship or dispute may

¹¹⁸ An approach which is, however, controversial: see, eg, L Brilmayer, ‘Governmental Interest Analysis: A House Without Foundations’ (1985) 46 Ohio St LJ 459; HH Kay, ‘A Defense of Currie’s Governmental Interest Analysis’ (1990) 215 *Collected Courses of the Hague Academy of International Law*.

¹¹⁹ See, eg, discussion in Mills, ‘Rethinking Jurisdiction in International Law’ (2014).

bear no connection to the parties or their activity. Parties conducting business in one part of the world may choose to be subject to courts and law which are remote from the place of performance of their agreement. In some legal systems these choices may be restricted by the need for some objective justification for the selection of a court or law, but in many legal systems there is no need for any such justification.¹²⁰ In many legal systems the effects of a choice of foreign law may be limited through a requirement to apply mandatory rules of the forum, which are generally reflective of local regulatory interests, but courts have in general not developed very satisfactory constraints on party autonomy where a choice of foreign court is combined with a choice of foreign law, generally excluding even the mandatory rules of the forum.¹²¹ In jurisdictional terms, the effect is that disputes may be resolved far away from the economies to which they are connected or the communities which they affect—on the other side of the world, far from potentially interested observers or affected third parties, or interventions by public interest groups. As the US Supreme Court has observed, ‘In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach, rather than in remote parts of the country where they can learn of it by report only’.¹²² In applicable law terms, the effect is that activity which takes place in a state’s territory as part of its economic and social life may be regulated by a set of rules established by a very different state with different values or social conditions.¹²³ The mandatory rules of the court chosen by the parties will be taken into account, reflecting the public interests of that state, but the mandatory rules or public interests of other states more closely connected to the issues are likely to be given more limited effect.¹²⁴ In EU law, the principle of subsidiarity requires that decisions are made as closely as possible to those affected by them, and as locally as possible—if this is indeed a principle of justice, it also suggests that the delocalisation effects of party

¹²⁰ See section 3.D above.

¹²¹ See, eg, discussion in Mills, *Party Autonomy in Private International Law* (2018) 476ff.

¹²² *Gulf Oil Corp. v Gilbert*, 330 U.S. 501 (1947).

¹²³ See further, eg, WJ Moon, ‘Contracting out of Public Law’ (2018) 55 Harv J on Legis 323.

¹²⁴ See, eg, discussion in Mills, *Party Autonomy in Private International Law* (2018) 484ff.

autonomy may raise concerns.¹²⁵ In sum, the law chosen by the parties may (although as discussed above will not necessarily) be more suitable for them or more efficient for regulating their relationship or resolving their dispute, but questions may be raised as to whether these factors should be prioritised over other considerations and interests which are marginalised when these decisions are passed from courts to private parties.

(ii) *Institutional Function*

The possibility for the parties to choose to resolve their disputes through a private arbitral tribunal rather than a national court may also be considered to raise regulatory concerns. Arbitration and other forms of alternative dispute resolution have long (and perhaps increasingly) been scrutinised for their effects, in particular for their capacity to deliver justice—including in fulfilment of the state's human rights obligations to provide access to justice¹²⁶—rather than merely provide a dispute settlement service.¹²⁷ In an international context these concerns are increased, particularly as globalisation has seen an expansion of direct international contracts between suppliers and customers, many of which contain arbitration clauses consolidating proceedings in the preferred jurisdiction of the supplier. The choice of a particular form of arbitration (and of the seat of the tribunal) will once again reflect private interests rather than those of any state—indeed this effect is further increased because an arbitrator is not a state agent but a private contracting party, and is under no public obligation to give effect to any national law, including mandatory rules, only a possible contractual duty to do so.¹²⁸ Arbitrators

¹²⁵ On the relationship between this principle, private law and private international law, see generally, eg, A Mills, 'Federalism in the European Union and the United States: Subsidiarity, Private Law and the Conflict of Laws' (2010) 32 *University of Pennsylvania Journal of International Law* 369.

¹²⁶ See section 2 above.

¹²⁷ See, eg, WM Landes and RA Posner, 'Adjudication as a Private Good' (1979) 8 *The Journal of Legal Studies* 235; OM Fiss, 'Against Settlement' (1983) 93 *Yale LJ* 1073; Resnik, 'Whither and Whether Adjudication?' (2006); H Genn, *Judging Civil Justice* (Cambridge University Press 2010); TCW Farrow, *Civil Justice, Privatization, and Democracy* (University of Toronto Press 2014); A Stone Sweet and F Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017); Fisher, 'Privatization of Legal Institutions'; XE Kramer *et al* (eds), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Edward Elgar 2022).

¹²⁸ See generally, eg, J Thakkar, 'Public and Private Ownership in Plato and Aristotle' in A Harel and A Dorfman (eds), *The Cambridge Handbook of Privatization* (Cambridge University Press 2021).

are also not answerable to judicial appointment processes, or appellate courts, but rather to the marketplace of arbitral appointments, which may affect their own approach to the resolution of the dispute between the parties—perhaps even incentivising the maximisation of speed and perceived even-handedness over the delivery of justice and the protection of legal rights.¹²⁹ Although arbitrator appointment processes are at least partially party-driven, arbitral institutions (who may appoint presiding arbitrators or single arbitrators if agreement cannot be reached on their appointment) may similarly have their own private interests, and the community of arbitrators may also favour particular private interests over others because of its sociological composition.¹³⁰

The ease of enforcement of arbitral awards adds to the concern that the parties may choose to resolve their disputes far away from the location of the relevant events, relying on the New York Convention 1958 for subsequent enforcement of the award if necessary. It is of course true that enforcement proceedings may involve consideration of public interests, such as whether the arbitration agreement or process was in some way contrary to public policy, but this is typically more limited than a full consideration of whether the arbitral tribunal gave effect to state mandatory rules, and the degree of scrutiny may even be in decline.¹³¹ The state in which the award is enforced may, in any event, also have no connection to the dispute between the parties, as it may merely be a convenient location of assets of the defendant. It is sometimes suggested that arbitrators have a duty to render an enforceable award, which requires them to take into account the mandatory rules or public policy of the likely place of enforcement of the award, but the precise content of this duty remains unclear, and it is not always possible for an arbitrator to anticipate where an award may subsequently be enforced.¹³² As a consequence, the various forms of public interest which might be taken into account in local courts, already potentially

¹²⁹ See generally, eg, Landes and Posner, 'Adjudication as a Private Good' (1979).

¹³⁰ See, eg, F Grisel, 'Marginals and Elites in International Arbitration' in T Schultz and F Ortino (eds), *The Oxford Handbook of International Arbitration* (Oxford Academic, Oxford University Press 2020); Y Dezalay and BG Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).

¹³¹ See Muir Watt, 'International Arbitration: A Critical Private International Law Perspective'.

¹³² See generally, eg, M Platte, 'An Arbitrator's Duty to Render Enforceable Awards' (2003) 20 *Journal of International Arbitration* 307; GJ Horvath, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18 *Journal of International Arbitration* 135.

marginalised through the free selection of a remote forum (as discussed above), may be potentially further marginalised through arbitration.

A further regulatory effect of arbitration arises from the fact that it is, at least generally, a confidential process. Not only may disputes be resolved far away from relevant events, but in fact even if they are resolved locally, there may be no possibility for third parties or public interest groups to intervene to ensure that a broader range of interests is protected. As noted above, another issue recently raised by a number of judges¹³³ is the concern that arbitration is slowing the development of the common law because decisions on difficult legal questions are increasingly made in confidential arbitral awards, not in published court decisions. This reflects the idea that the judicial determination of disputes has a dual function—not only a private benefit in resolving a particular dispute (and delivering justice to the parties), but also a public benefit in clarifying and developing the law for other parties, and perhaps even airing problems which are more suitably reformed through parliamentary intervention. The allocation of regulatory power to private arbitrators has a cost in taking away the public benefit which would be provided by resolving the dispute publicly.¹³⁴ This concern may particularly arise where a large number of parties have very similar claims against a single defendant or multiple defendants, but where their legal position is unclear. If these claims arise under contracts which provide for confidential arbitration, each individual claim must generally be arbitrated without the benefit of precedent, which is not only extremely inefficient but raises access to justice concerns, particular if class arbitration proceedings are excluded.¹³⁵

¹³³ See, eg, Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, 'Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration', The Bailii Lecture 2016 (available at <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>). It should perhaps be noted, however, that the Arbitration Act 1996 (UK) includes, in s.45, a little-used mechanism for the parties (by agreement) or a party (with the permission of the arbitrator) to refer questions of law to the English courts for decision. For discussion of similar concerns in the US context, see also, eg, Landes and Posner, 'Adjudication as a Private Good' (1979); J Maria Glover, 'Disappearing Claims and the Erosion of Substantive Law' (2015) 124 *The Yale Law Journal* 3052.

¹³⁴ See further, eg, J Resnik, 'Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights' (2015) 124 *The Yale Law Journal* 2804.

¹³⁵ See further, eg, Mills, *Party Autonomy in Private International Law* (2018) 299ff.

(iii) Substantive Function

The possibility for the parties to choose non-state law to govern their legal relationship, typically in conjunction with a choice of non-state institutional dispute resolution through arbitration, raises perhaps the most obvious regulatory questions. To the extent that the applicable law is being relied on only to provide default rules, in the absence of terms negotiated by the parties, the selection of a non-state rather than state source for those rules may be considered unproblematic in regulatory terms, as in either case the choice of law process is merely part of the process of agreeing the contractual terms. However, as discussed earlier in this article,¹³⁶ this does not capture the role of the applicable law in limiting and in some cases overriding party agreement, such as through non-derogable rules of contract law, or rules invalidating certain forms of contract. If the parties may make a choice of non-state law, this goes beyond their usual power to choose *which* state's public interests apply through a choice of court or choice of law agreement, reflected in the application of the chosen court's mandatory forum rules or the non-derogable rules of the chosen system of private law. A choice of non-state law enables the parties to exclude *any* set of public interests as part of the applicable law. Whether this is indeed the outcome of a particular choice of non-state law depends, of course, on what kinds of interests are reflected in the processes through which the selected rules of non-state law have been generated, and whether there are limitations on the choices which may be made by the parties. The application of non-state law is also subject to potential review and the potential application of some public considerations if judicial enforcement of an arbitral award based on non-state law is subsequently required, although as noted above such review is generally limited and the place of enforcement may be simply based on the location of relevant assets rather than bearing any objective connection to the parties or their relationship. The general effect of permitting a choice of non-state law is to 'elevate' non-state lawmakers to a position of authority traditionally limited to state officials. Any evaluation of such a change depends very much on the specific characteristics of the system of non-state law chosen—but the general effect is evidently a potentially radical reconfiguration and reorientation

¹³⁶ See section 3.A above.

of regulatory power, which raises questions concerning the legitimacy of non-state law and of its potential recognition by state actors.¹³⁷

6. Conclusions

Privatisation has a variety of effects on the law, which have in common that they present a challenge to established legal boundaries. In domestic law, privatisation most obviously challenges the boundary between public and private law. In international law, privatisation has presented further challenges to the boundary between (public) international and (public or private) domestic law, particularly in the contexts of state responsibility and international investment law. This article has argued that privatisation also provides a useful lens through which to understand and analyse developments in private international law—in particular, the ability of parties to choose the court and applicable law for their legal relationships and disputes, their ability to choose a non-state forum in the form of an arbitral tribunal, and their (limited) ability to choose non-state law to govern their relationship. In each case, these developments also challenge legal boundaries because a function traditionally performed by state lawmakers and/or judges has been passed to the private sector, and becomes regulated by private interests and globalised market forces rather than state policies—by contract and not by national (or private international) regulation. In respect of a simple choice of court and choice of law, the effect is a privatisation of the allocative function of private international law, its determination (traditionally within the framework of public international law's allocative rules of jurisdiction) of which state's institutions and substantive regulation govern a cross-border dispute or relationship. In respect of the choice of arbitration, the effect is a (partial, but extensive) privatisation of the institutional function of private law dispute resolution traditionally carried out by national courts—the replacement of courts

¹³⁷ 'The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others'—J Locke, *The Second Treatise of Government* (P Laslett ed., Cambridge University Press 1988), s.141. See also Muir Watt, 'International Arbitration: A critical private international law perspective'; C Cordelli, 'The Wrong of Privatization: A Kantian Account' in A Harel and A Dorfman (eds), *The Cambridge Handbook of Privatization* (Cambridge University Press 2021); Fisher, 'Privatization of Legal Institutions'; Y Kariv-Teitelbaum, 'Privatization of Regulation: Promises and Pitfalls' in A Harel and A Dorfman (eds), *The Cambridge Handbook of Privatization* (Cambridge University Press 2021).

exercising public law authority with tribunals exercising delegated contractual powers. In respect of the choice of non-state law, the effect is a potential privatisation of the substantive law regulatory function traditionally carried out exclusively by state legal systems—the replacement of state lawmakers with privately generated law dependent on non-state sources of authority. Indeed, both the choice of arbitration and of non-state law constitute forms of double-privatisation, as in these contexts it is not merely the allocative function which is privatised, but the object of the allocative choice itself.

Understanding each of these effects in terms of privatisation is not only analytically helpful, but also opens up a range of normative questions which we might ask about the benefits and challenges of these changes. This article has highlighted three such sets of questions—focusing on the efficiency, distributive effects and regulatory effects of party autonomy, and considering both the effect of the privatisation on the private international law decision itself (the decision on forum or applicable law) and also its effect on the actual resolution of subsequent disputes between the parties. The evaluation of these effects provided in this article, particularly in section 5, expresses some qualms regarding the impact of the development of party autonomy in private international law. It may, for example, be questioned whether party autonomy ultimately leads to more efficient dispute resolution processes, for reasons discussed in section 5.A. Questions may also be raised concerning the distributive consequences of allocating private international law decisional power to individuals, including in respect of both the costs of making the private international law decision, and the costs and benefits to the institution or system which resolves the dispute, as examined in section 5.B. Further questions may be asked concerning the regulatory effects of privatising either the private international law decision or the institutional or substantive function of private law dispute resolution, examined in section 5.C, as the change in decision-maker (from public to private) does not just affect efficiency or costs allocation, but also the range and weighting of values and interests which are taken into account in decisions.

It is, however, important to note that privatisation, at least in general terms, is not inevitably or inherently ‘good’ or ‘bad’, and this framework does not merely raise concerns, but provides reasons which support party autonomy, particularly ways in which it may increase efficiency and relieve courts of the burden of difficult decisions—helping to deliver access to justice rather than frustrating it. It is also important

to note that there are other perspectives that may be adopted on party autonomy which would offer different lenses and side-line some of these concerns. It has been argued, for example, that the justifications for party autonomy are essentially moral (and therefore not dependent on factors such as efficiency gains), as it is a reflection of individual liberty which should be considered foundational and as prior to the application of any particular national law.¹³⁸ It is further important to acknowledge that the specific rules on party autonomy adopted by particular legal systems will frequently include qualifications or constraints which address some of the concerns raised,¹³⁹ and the evaluation of party autonomy requires consideration of its particular context as well as questions of principle. Party autonomy is of course also so widespread and embedded in practice that it is scarcely imaginable that it would be reversed—a feature this transformation incidentally shares with many other forms of privatisation.

The most significant point of this analysis is simply that choice of court and choice of law clauses and arbitration agreements should not be thought of as boilerplate, as ‘lawyers clauses’ at the end of contracts. Private international law should be examined not only in terms of how it resolves disputes between the parties, but also in terms of how it allocates authority between different legal orders, and indeed beyond them. It is important to recognise that party autonomy potentially allows a complex multiple privatisation—of aspects of private law, international law and especially private international law—and that in so doing, it reflects a potential shrinking of the sphere of state regulation of globalised private relations, to be replaced by private actors subject to market forces. And it is essential to think carefully about the implications of this development, and what types of safeguards are necessary to ensure that the law continues to be driven by the interests of all those who it ought to serve.

¹³⁸ See generally discussion in Mills, *Party Autonomy in Private International Law* (2018), Chapter 2.

¹³⁹ See generally Mills, *Party Autonomy in Private International Law* (2018), Chapters 5 and 9.